Supreme Court, U.S.
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In The

Supreme Court of the United States

SCOTT P. ROBART,

Petitioner,

v.

THE STATE OF ALASKA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Alaska

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner Scott Robart designed, marketed, and sold a commemorative medallion bearing a replica of the state seal of Alaska. For this conduct, the State of Alaska charged him with the crime of unauthorized use of the state seal for an advertising or commercial purpose. The trial court convicted him.

The questions presented are:

1. Does the First Amendment prohibit the State of Alaska from prosecuting Robart for non-deceptive expressive use of the state seal on an article sold in commerce?

2. Section 301 of the federal Copyright Act expressly preempts state laws that create rights equivalent to the exclusive copyright rights (*e.g.*, display, derivation, distribution, and reproduction) in works within the subject matter of copyright (*e.g.*, works of art). Does the Copyright Act preempt Alaska's prosecution of Robart for marketing and selling replicas of the state seal?

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OPINIONS BELOW

The first opinion of the Alaska Court of Appeals holding that commercial speech is not protected speech and rejecting Scott P. Robart's First Amendment challenge is reported at *State of Alaska v. Scott P. Robart*, 988 P.2d 1114 (Alaska Ct. App. 1999) ("*Robart I*") (App. 20). The March 31, 1998 opinion of the Alaska District Court from which the first appeal was taken is unreported. (App. 26) The June 2, 2000 and May 21, 2001 Orders of the Alaska Supreme Court granting the Petition for Hearing of *Robart I* on copyright preemption and First Amendment grounds and subsequently denying the Petition for Hearing are unreported. (App. 32 & 34)

The second opinion of the Alaska Court of Appeals holding that the federal Copyright Act does not preempt the state statute that prohibits unauthorized use of the state seal is reported at *Scott P. Robart v. State of Alaska*, 82 P.3d 787 (Alaska Ct. App. 2004) ("*Robart II*") (App. 1). The November 13, 2001 opinion of the Alaska District Court addressing the copyright preemption issue is unreported. (App. 35) The April 9, 2002 final judgment of the Alaska District Court from which the second appeal was taken is unreported. (App. 39) The May 17, 2004 Order of the Alaska Supreme Court denying the Petition for Hearing of *Robart II* is unreported. (App. 42)

BASIS FOR JURISDICTION

The Alaska Court of Appeals entered its judgment affirming Petitioner's criminal conviction on January 23, 2004. Petitioner's petition to the Alaska Supreme Court for discretionary review was denied on May 17, 2004. (App.

42) This petition is timely filed within 90 days. Sup. Ct. R. 13.1, 13.4 & 29.2. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The Alaska Statutes provide:

> **Sec. 44.09.015 Use of seal without permission prohibited.** (a) A person may not use or make a die or impression of the state seal for any advertising or commercial purpose, unless written permission has first been obtained from the lieutenant governor.
>
> (b) Violation of this section is a misdemeanor, and upon conviction is punishable by a fine of not more than $500, or by imprisonment for not more than six months, or by both.

The Appendix contains the relevant portions of the other constitutional and statutory provisions involved in this matter: Article I, § 8, Article VI, and the First Amendment to the United States Constitution; selected sections of the Copyright Act of 1976, 17 U.S.C. §§ 101, 102, 103, 105, 106, and 301; and Alaska Stat. §§ 44.09.010 & 44.09.017. The Appendix also includes other state statutes similar to Alaska Stat. § 44.09.015.

STATEMENT OF THE CASE

A. The Underlying Facts

Petitioner Scott P. Robart ("Robart") designs, produces and sells patriotic medallions and other celebratory, commemorative articles. In response to a public-private solicitation from the State of Alaska and the QVC cable television network, Robart designed a gold and silver medallion to commemorate "the centennial of two of the most interesting years in Alaska's history: the Gold Rush years." (App. 89) Robart's design features a miner symbolizing the Alaska Gold Rush of 1897 on one side and the Alaska State Seal on the other. (App. 88)

After the State and the cable network selected Robart's medallion for the television show, Robart produced the medallions. (App. 87) The Governor of Alaska congratulated Robart on earning the opportunity to present his product "during the upcoming QVC live national broadcast" (App. 3) and appeared on the national telecast in May 1997 in support of the product. Notwithstanding the Governor's support, Robart never obtained explicit, affirmative, prior approval from the Lt. Governor to use the state seal. After the national broadcast on QVC, the Lt. Governor instructed Robart to stop selling the medallions.

Upon hearing reports that Robart was continuing to sell the medallions without the permission of the Lt. Governor, Alaska State Troopers set up a "sting" operation to purchase medallions from Robart. In August 1997, Robart sold two medallions to an undercover Alaska State Trooper for $50. Robart did not conceal his identity, never claimed to be acting on the part of the State, and never presented his medallion as an official state product. This criminal prosecution followed.

B. The Proceedings Below

1. How the State of Alaska Charged Robart.

The State of Alaska charged petitioner Scott P. Robart in an Amended Information with one count of using the Alaska State Seal without permission in violation of Alaska Stat. § 44.09.015. (App. 83) The Amended Information charged Robart with two unauthorized "uses": "marketing" the medallion on the QVC shopping network and selling two medallions to the undercover trooper. The State did not charge Robart with any deceptive, misleading, or non-truthful use of the seal. It did not charge Robart with using the seal in any way that communicated government approval.

2. Robart's First Amendment Challenge.

On Robart's motion, and after an evidentiary hearing, the state district court dismissed the complaint on First Amendment grounds. The court made factual findings that the state seal is a work of art and Robart's use of the seal is art. (App. 27) The court found that "the state can protect the seal by a more narrowly drawn criminal statute prohibiting fraudulent use of the state seal." (App. 31)

3. In *Robart I*, the Alaska Court of Appeals Ignored the District Court's Factual Findings and Reversed the First Amendment Dismissal.

In *Robart I* – the first decision that Robart asks this Court to review – the Alaska Court of Appeals held that the First Amendment does not protect the commercial, nondeceptive use of the state seal. The court of appeals applied the following reasoning in rejecting the First

Amendment challenge. First, commercial speech is not protected under the First Amendment. (App. 22) Second, Alaska Stat. § 44.09.015 only proscribes commercial speech. (App. 23) Third, relying on *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*[1] ("*SFAA*") the court held that Alaska has a legitimate governmental interest in regulating the commercial use of the seal and "because it does not impact any non-commercial use of the state seal, the potential restriction of speech is narrower than that of the statute in [*SFAA*]." (App. 24)

4. The Alaska Supreme Court Granted Robart's Petition for Hearing to Consider Federal Copyright Preemption and First Amendment Issues and Then Dismissed the Petition.

Robart petitioned the Alaska Supreme Court for discretionary review of *Robart I*. The court granted the petition to consider "whether AS 44.09.015 is preempted by federal copyright law" and First Amendment issues. (App. 32-33) The court directed the parties to address *Bicentennial Comm'n of Pennsylvania v. Olde Bradford Co.*,[2] in which the Commonwealth Court of Pennsylvania held that federal copyright law preempted a state statute that prohibited mere reproduction of the seal of the Pennsylvania Bicentennial Commission. (App. 32) After briefing and oral argument the court dismissed the Petition for Hearing, remanding the case to the district court. (App. 34)

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[1] 483 U.S. 522 (1987).

[2] 365 A.2d 172 (Pa. Commw. Ct. 1976).

5. The Trial Court Denied Robart's Motion to Dismiss on Federal Copyright Preemption Grounds and Convicted Robart.

On remand, Robart moved to dismiss the complaint on the grounds of preemption by federal copyright law. The district court denied the motion. (App. 35) A jury subsequently found Robart guilty and the District Court entered judgment, imposing a $250 fine and placing Robart on probation. (App. 34-41)

6. In *Robart II*, the Alaska Court of Appeals Affirmed the Trial Court Ruling on Federal Copyright Preemption.

In *Robart II* – the second decision that Robart asks this Court to review – the Alaska Court of Appeals held that federal copyright law does not preempt the statute that prohibits unauthorized use of the state seal. The court did not cite any copyright cases in support of its holding and did not construe any section of the Copyright Act. The state court applied the following reasoning in rejecting the copyright preemption challenge. First, the seal statute is beyond the purview of federal copyright because: (a) states have the inherent power "to protect symbols of their sovereignty" (App. 9-10); and (b) state seals are more akin to trademarks than to copyrights because the purpose of a state seal, like a trademark, is to prevent confusion as to the source of goods or services (App. 11-12). Second, Congress did not intend to preempt state seal laws because Congress was silent regarding state seals in the Copyright Act (App. 10-11) and Congress' protection of symbols of federal sovereignty in 18 U.S.C. § 713(a) implies that states are free to extend like protection to symbols of state sovereignty (App. 12-13).

REASONS FOR ALLOWANCE OF THE WRIT

This case requires the Court to decide whether state regulation of non-deceptive, commercial use of state seals in celebration of the state's history is immune from either First Amendment scrutiny or preemption by the federal Copyright Act. Resolution of these questions will determine the enforceability of numerous state statutes similar to Alaska's and will dispel the chilling effect of the decision below in the area of interstate commerce relating to the sales of patriotic medallions.

The state court's First Amendment holding in *Robart I* requires this Court's review for three reasons. First, the state court's holding that commercial use of a state seal is not speech protected by the First Amendment conflicts with *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*[3] and later cases holding that commercial speech is entitled to vigorous First Amendment protection. Second, the state court's holding that states may, consistent with the First Amendment, criminalize the use of state symbols like state seals conflicts with *Texas v. Johnson*.[4] Third, the state court's failure to apply strict scrutiny to Alaska's law requiring prior approval of use of the state seal in commercial speech conflicts with this Court's prior restraint jurisprudence.[5]

The copyright holding in *Robart II* that the federal Copyright Act does not preempt Alaska Stat. § 44.09.015 also merits review by this Court. The rejection of Copyright

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[3] 425 U.S. 748, 762 (1976).

[4] 491 U.S. 397 (1989).

[5] *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

Act preemption creates a square conflict among the lower courts. That conflict concerns an important issue of law with broad ramifications because roughly half of the states have statutes like Alaska's that restrict the unauthorized use of state seals by private parties. Most of these statutes carry criminal penalties.

The holding below threatens the vibrant national commerce in patriotic and commemorative products. Congress enacted the preemption provision, 17 U.S.C. § 301, in 1976 during a general revision of the Copyright Act. One of Congress' paramount goals was to enhance the predictability of copyright rights. What we now face in the arena of commerce involving patriotic products is the antithesis of this predictability. The holding below creates a conflict that makes it impossible to predict whether other state seal statutes are preempted. Further, the court below reached its result by relying on authorities and principles outside the text of the Copyright Act. This reasoning also frustrates predictability by validating a preemption analysis different from the specific approach intended by Congress and established in the 1976 Copyright Act. The unpredictability engendered by the ruling below chills the national trade in medallions and other products because many of the state statutes carry criminal penalties. "Percolation" will not resolve this conflict. This Court should take this case to eliminate the unpredictability and chilling effect caused by the decision below.

The state court decided this important federal question incorrectly. Under the "clear and most unequivocal language" of 17 U.S.C. § 301, a state law is preempted when it concerns rights within the "general scope" of copyright under 17 U.S.C. § 106 (*i.e.*, rights equivalent to copyright rights such as display, derivation, reproduction,

and distribution), as applied to a work within the "subject matter" of copyright defined in 17 U.S.C. § 102. The state seal is a work of art within the subject matter of copyright under 17 U.S.C. § 102(a)(5). The state charged Robart with nothing more than displaying and distributing replicas of the state seal.

The court below held that state seals are categorically beyond the purview of federal copyright law because the state seal functions as a symbol of sovereignty that – like a trademark – identifies the state as the source of goods or services. No one doubts that the state can prohibit deceptive or confusing uses of the seal or uses that falsely imply official state action. But those concerns are wholly absent in this case. The statute does not include, and Robart was not charged with, any element of deceptive or confusing use of the seal.

Robart's use of the seal conflicts with an entirely *different* aspect of the state's use of the seal: its use as a source of revenue for the state. Alaska authorizes the sale of "official" commemorative medallions bearing the state seal, for which the state "shall receive a royalty."[6] The statute under review protects the state's potential royalty stream against competition from other vendors such as Robart. Protecting an author's right to prohibit unauthorized copies is a core function of any copyright scheme. The state seal statute falls within the purview of copyright and the court below should have found Alaska Stat. § 44.09.015 preempted under 17 U.S.C. § 301. Its failure to do so allowed the state to convict Scott Robart of the "crime" of competing with the state in the sale of state seal medallions.

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[6] Alaska Stat. § 44.09.017 (App. 48-49).

I. This Case Presents an Issue of Great Importance to this Court's First Amendment Jurisprudence.

Scott Robart used the Alaska State Seal to commemorate and affirm the rich and exciting history of Alaska and its people, including the 1897 Alaska Gold Rush. Rather than protest against the state, Robart celebrated the state and its culture. Rather than celebrate the state by waving Alaska's flag or selling commemorative items that incorporated Alaska's flag, Robart celebrated the state by designing and producing a medallion that incorporated Alaska's seal. The Constitution provides Robart with the same protection for use of this government symbol in celebration as it provides him when he uses this government symbol in protest. Robart's commercial gain from this use of the state seal, a work of art, does not deprive him of First Amendment protection.

A. The Alaska Court of Appeals Improperly Relied on *SFAA v. USOC* While Ignoring *Texas v. Johnson* in Denying the First Amendment Challenge.

In *Johnson*, this Court articulated the constitutional protections afforded to a citizen's use of government symbols:

> We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents. . . . To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory,

> prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.[7]

Johnson continued a long history of First Amendment protection for a diverse variety of expression. "All ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties [of the First Amendment]."[8] In contrast to the defendant in *Johnson*, who was burning the flag in protest, Robart created a medallion that used the seal in celebration of Alaska's history. This Court has never ruled that celebratory speech is less deserving of First Amendment protection than political protest.

The state court ignored both this Court's First Amendment jurisprudence and the trial court's factual finding that Robart's use of the medallion is art when it ruled that Robart's use of the seal was not protected by the First Amendment. This Court has explained:

> [A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message," *cf. Spence*, 418 U.S. 405, 411 (1974) (per curiam), would never reach the unquestionably shielded painting of Jackson Pollock, music of

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[7] 491 U.S. at 417.

[8] *Roth v. United States*, 354 U.S. 476, 484 (1957).

> Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.[9]

Given the wide variety of commercial and non-commercial expression that the First Amendment protects, expressive, non-deceptive use of governmental seals is protected.[10] The art does not become less expressive simply because Robart sold the medallions.[11] Because the commercial and expressive parts of Robart's medallion are "inextricably intertwined," the Court should not attempt to separate the protected speech from any unprotected speech.[12] In considering a First Amendment challenge, the court must "closely scrutiniz[e] [the statute] to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech."[13]

To reach its conclusion that Robart's use of the Alaska seal is not protected, the court of appeals ignored this First Amendment jurisprudence and, instead, incorrectly relied on *SFAA* for three reasons.

First, the Alaska court failed to use the test from *Central Hudson Gas & Electric Corp. v. Public Serv.*

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[9] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

[10] *See, e.g., New York v. Ferber*, 458 U.S. 747, 765 n.18 (1982) ("nudity, without more is protected expression").

[11] *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981).

[12] *Riley v. Northern Federation of the Blind of North Carolina*, 487 U.S. 781, 795-96 (1988).

[13] *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727, 743 (1996).

Comm'n,[14] test for determining whether a statute withstands First Amendment scrutiny when a government actor such as the State of Alaska is involved.

Second, the civil statute approved in *SFAA* included a deceptive or false use element and did not require prior approval to use the Olympic symbol.[15] In contrast, Alaska Stat. § 44.09.015 lacks a deceptive or false use element and the statute requires prior approval.

Third, while this Court relied on congressional findings to support the prohibition on promotional use of the word "Olympic" in *SFAA*,[16] the Alaska legislature made no findings about the need to restrict commercial or advertising use of the seal. Indeed, the state authorizes the creation and sale of official "Alaska commemorative medallions" that "shall contain the state seal" by a private vendor with royalty revenue to the state.[17] Just as the trial court originally ruled in considering Robart's First Amendment challenge, Alaska Stat. § 44.09.015 is more restrictive than necessary to further the state's only legitimate interest in restricting use of the seal – to prohibit deceptive use of the seal by persons attempting to impersonate the state.

Thus, the court of appeals incorrectly relied on *SFAA* while ignoring *Johnson* in deciding issues of constitutional importance.

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[14] 447 U.S. 557, 563-66 (1980). This test is discussed in detail in Section I.B. of this Petition.

[15] *SFAA*, 483 U.S. at 528-29.

[16] *SFAA*, 483 U.S. at 528-30.

[17] Alaska Stat. § 44.09.017 (App. 48-49).

B. The Holding in *Robart I* that Robart's Use of the Seal is Not Protected Speech Conflicts with This Court's Decisions Holding That the First Amendment Protects Commercial Speech.

Without citation, the Alaska court held that "[c]ommercial use of the state seal is not protected speech." (App. 22) This holding is in direct conflict with this Court's holding in *Virginia State Bd. of Pharmacy* that commercial speech is within the scope of the First Amendment and is protected speech.[18] This holding also ignores this Court's explanation that commercial speech is "usually defined as speech that does no more than propose a commercial transaction."[19]

The text of the First Amendment does not distinguish between commercial and noncommercial speech. To determine whether a statute that regulates commercial speech violates the First Amendment, the Court applies the test established in *Central Hudson.*[20] So long as the commercial speech is not misleading, as was the case with Robart's medallion, then a three-part test applies: the government interest must be "substantial," the statute must directly advance the government interest, and the statute must be no more extensive than necessary.[21] By failing to perform this

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[18] 425 U.S. at 762.

[19] *United States v. United Foods*, 533 U.S. 405, 409 (2001). Robart asserts that using the seal in a medallion is protected under the First Amendment whether it is treated as commercial speech or noncommercial expression (art).

[20] 447 U.S. at 563-66; *see* A. Kozinski & S. Banner, *Who's Afraid of Commercial Speech?*, 76 Va.L.Rev. 627 (1990).

[21] *Central Hudson*, 447 U.S. at 563-66.

analysis, the court of appeals decision conflicts with the decisions of this Court. Properly applying the three-part test, as the trial court did, it is apparent that Alaska "can protect the seal by a more narrowly drawn criminal statute prohibiting fraudulent use of the state seal." (App. 31) Vermont has enacted an appropriately narrow criminal statute.[22]

C. Alaska Stat. § 44.09.015 Is An Improper Prior Restraint on Freedom of Speech and Freedom of Expression.

Finally, by requiring anyone who wants to use the seal for purposes that are partly commercial to obtain prior written permission from the Lt. Governor, Alaska Stat. § 44.09.015 establishes an improper prior restraint on use of the Alaska seal. A prior restraint occurs when a statute requires an individual to obtain prior approval for expressive activities.[23] Whenever a prior restraint exists, the Court must examine the restraint with strict scrutiny. To pass the strict scrutiny test for a prior restraint, the government must satisfy three elements.

First, the restrained activity must pose a clear and present danger or a serious and imminent threat to a protected interest.[24] The reasons for restricting use of the state seal and for requiring that a potential user obtain prior permission from the Lt. Governor do not appear in either the legislative history (none exists) or the words of the statute. The court of appeals, however, failed to find any clear and present danger or any serious and imminent

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[22] Vt. Stat. Ann. tit. 13, § 1904a (2003) (App. 77-78).

[23] *Alexander v. United States*, 509 U.S. 544, 551 (1993).

[24] *Wood v. Georgia*, 370 U.S. 375, 383-85 (1962).

threat to any alleged protected interest in use of the seal. Thus, Alaska Stat. § 44.09.015 does not satisfy the first element for approval of a prior restraint.

Second, the restriction must be narrowly drawn.[25] The state's interest in restricting use of the state seal lies in preventing its fraudulent use. While a statute that reasonably restricts fraudulent or misleading use of the seal might pass constitutional muster, Alaska Stat. § 44.09.015 is not so narrowly drawn.[26]

Third, the state must show that less restrictive alternatives are not available.[27] In this case, the legislature can amend the statute by removing the requirement of prior permission and adding a deceptive or misleading use element.

Considering all three elements, Alaska Stat. § 44.09.015 fails to pass the strict scrutiny test for a prior restraint. Accordingly, the statute violates the First Amendment.

D. *Robart I* Raises Important Constitutional Questions Left Open in *Texas v. Johnson*, *United States v. Eichman*, and *Spence v. Washington* Concerning the Continuing Vitality of *Halter v. Nebraska*.

In *Halter v. Nebraska*,[28] this Court upheld, against a substantive due process challenge, a Nebraska state statute that prohibited the use of the American flag on

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[25] *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 183-84 (1968).

[26] *Compare, e.g.*, Vt. Stat. Ann. tit. 13, § 1904(a) (2003) (App. 77-78).

[27] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563 (1976).

[28] 205 U.S. 34 (1907).

advertisements. The holding in *Halter* is in tension with the Court's more recent "flag" cases: *Spence v. Washington*,[29] *Texas v. Johnson*,[30] and *United States v. Eichman*.[31] The majority opinion in each case distinguished *Halter* on two grounds: first, that *Halter* was decided before the First Amendment was applied to the states, and second, that *Halter* concerned pure commercial speech.[32]

Addressing the first distinction, this Court has subsequently recognized that the First Amendment applies to the states. Second, this Court has confirmed that the label "pure commercial speech" carries no weight in First Amendment analysis.[33] Any regulation of speech – however tied to commerce – that inhibits expression is subject to heightened scrutiny under the First Amendment.[34] In addition, there is no constitutional distinction between statutes regulating the national flag and statutes regulating other symbols of sovereignty.[35] Citizens must be able to use both flags and government seals in both protest and celebration.

The issue presented by this case – whether the state can, in the guise of regulating commerce, prohibit expressive uses of symbols of state sovereignty – is the issue left open in *Halter, Johnson, Spence,* and *Eichman*. The Court

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[29] 418 U.S. 405 (1974).

[30] 491 U.S. 397 (1989).

[31] 496 U.S. 310 (1990).

[32] *Spence*, 418 U.S. at 413, n.7; *Johnson*, 491 U.S. at 415 n.10; *Eichman*, 496 U.S. at 315 n.4.

[33] *Virginia State Bd. of Pharmacy*, 425 U.S. at 762.

[34] *44 Liquormart*, 517 U.S. at 502-505.

[35] *See Johnson*, 491 U.S. at 417.

should take this case to decide this important issue in its First Amendment jurisprudence.

II. Whether the Copyright Act Preempts State Laws that Prohibit Unauthorized Commercial Use of the State Seal is an Important Question Of Federal Law that Should be Settled by the Court.

The Court last addressed copyright preemption in *Goldstein v. State of California* (1973),[36] which, like this case, arose from a state court criminal conviction. This court has never addressed whether the Copyright Act preempts state statutes prohibiting unauthorized commercial use of state seals. For the following reasons it should do so now.

A. The Preemption Ruling In *Robart II* Conflicts Directly With *Olde Bradford*.

In *Olde Bradford,* the Commonwealth Court of Pennsylvania held that the seal of the Pennsylvania Bicentennial Commission was within the subject matter of copyright and that federal copyright law preempts a Pennsylvania statute that prohibited, "as does federal copyright law, the mere unauthorized production of the Commission's mark."[37]

The Pennsylvania court held that seals are works of art within the subject matter of copyright: "It is clear that Congress has acted to protect representations such as the

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[36] 412 U.S. 546 (1973).

[37] *Olde Bradford,* 365 A.2d at 177-78.

one in the case at bar."[38] The court relied on §§ 5(g) and (h) of the 1909 Copyright Act, which are identical in all material respects to the comparable provisions in the current Copyright Act, 17 U.S.C. §§ 102(a)(5) and 101.[39] The decision below squarely conflicts with *Olde Bradford* on whether state seals are within the subject matter of copyright and whether the state seal statute is preempted.

The conflict with *Olde Bradford* is no less significant merely because the Commonwealth Court of Pennsylvania is not a "state court of last resort."[40] *Robart II* and *Olde Bradford* are the only two reported cases that directly address whether the Copyright Act preempts a seal statute. For other courts seeking guidance, the conflict is irreconcilable. Indeed, the court below did not even try to reconcile its holding with *Olde Bradford*: Despite citing *Olde Bradford* for general propositions (App. 11-12), it stated that "we cannot find a single . . . state case discussing the application of federal copyright law on laws protecting state seals." (App. 11)

B. This Case Affects the Enforceability of Many State Statutes Similar to Alaska's.

This case has broad ramifications because it will affect the enforceability of state statutes in roughly half the

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[38] *Olde Bradford*, 365 A.2d at 178.

[39] *Compare* 17 U.S.C. § 5(g) ("Works of art; models or designs for works of art") and (h) ("Reproductions of a work of art") (1909 Copyright Act, revised in 1976) *with* 17 U.S.C. §§ 102(a)(5) and 101 ("Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, . . . and art reproductions.") (App. 44-45).

[40] Sup. Ct. R. 10(b).

states in the union. At least 22 states (including Alaska) prohibit unauthorized commercial use of the state seal, either by expressly prohibiting unauthorized use for commercial purposes, by prohibiting all non-governmental uses, or by allowing educational or commemorative uses only with prior approval.[41] Another 4 states impose other restrictions on private-party use of reproductions of the state seal.[42] 18 of these states (including Alaska) provide criminal penalties – imprisonment and/or fines – for violations of the state seal statute.[43]

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[41] Alabama Code § 13A-10-13(a) (2004); Alaska Stat. § 44.09.015 (1997 & 2004); Arizona Rev. Stat. Ann. § 41.130 (2004); California Gov't Code § 402(a) (West 2004); Connecticut Gen. Stat. § 3-106a (2003); Delaware Code Ann. tit. 29, § 2306(b) (2004); Georgia Code Ann. §§ 50-3-31, 50-3-8 (2002); Hawaii Rev. Stat. § 5-6 (2003); Illinois Rev. Stat. Ch. 5 para. 460/5 and Ch. 720 para. 620/1 (2004); Maine Rev. Stat. Ann. tit. 1, § 204 (2003); Michigan Com. Laws § 2.45 (2004); Nevada Rev. Stat. § 235.010(4) (2004); New Hampshire Rev. Stat. Ann. § 3:9-a (2003); New Jersey Stat. Ann. § 52:2-9 (2004); New York State Law § 74 (Consol. 2004); North Dakota Cent. Code § 54-02-01(2)(d) (2003); Ohio Rev. Code Ann. § 5.10 (2004); Rhode Island Gen. Laws § 11-15-4 (2004); South Dakota Codified Laws Ann. §§ 1-6-3.1, 1-6-3.2 (2003); Texas Bus. & Comm. Code § 17.08(b) (2004); and Virginia Code Ann. § 7.1-31.1 (2004); Washington Rev. Code Ann. §§ 43.04.030, 43.04.040 (2004). (App. 49-82).

[42] Florida Stat. § 15.03(3) (2004) (authorized uses permitted for "proper purposes" only); Ohio Rev. Code Ann. § 5.10 (2004) (use permitted to promote economic or cultural development of state); Oregon Rev. Stat. § 186.023 (2003); (no use implying sponsorship or exposing the seal to ridicule, debasement or infamy); South Carolina Code Ann. § 38-57-45 (2003) (use of state seal prohibited in insurance advertisements. (App. 54, 69-73).

[43] Alabama Code § 13A-10-13(c) (2004) (Class C Felony); Alaska Stat. § 44.09.015(b) (1997 & 2004) (misdemeanor punishable by imprisonment up to 6 months and/or up to $500 fine); Arizona Rev. Stat. Ann. § 41.130 (2004) (class 3 misdemeanor); California Gov't Code § 402(a) (West 2004) (misdemeanor); Delaware Code Ann. tit. 29, § 2306(c) (2004) ($100 to $250 fine); Florida Stat. § 15.03(3) (2004) (2d degree misdemeanor); Hawaii Rev. Stat. § 5-6 (2003) (misdemeanor);

(Continued on following page)

C. The Decision Below Thwarts Congress' Goals Of Securing Uniformity and Enhancing Predictability of Copyright Rights.

In *Community for Creative Non-Violence v. Reid*, the Court recognized Congress' dual objectives in the 1976 revision of the Copyright Act of creating national uniformity in copyright law and the "paramount goal" of enhancing predictability in copyright law.[44] The holding below thwarts these congressional goals within the specific arena of the national commerce in patriotic products. Only this Court can remove the impediment to Congress' goals created by the decision below.

Anyone who reads Parade magazine, searches eBay.com for "medallion," or watches the national broadcasts of the QVC shopping channel is aware of the vibrant national commerce in medallions and other products that commemorate historic events and celebrate patriotic themes. Many states, including Alaska, promote and exploit this national commerce by selling or authorizing vendors to sell commemorative and souvenir items bearing

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Illinois Rev. Stat. Ch. 720 para. 620/1 (2004) (class C misdemeanor); Maine Rev. Stat. Ann. tit. 1, § 204 (2003) (class E crime); Nevada Rev. Stat. § 235.010(7) (2004) (misdemeanor); New Hampshire Rev. Stat. Ann. § 3:9-a (2003) (misdemeanor for natural persons; felony otherwise); New Jersey Stat. Ann. § 52:2-4 (2004) ($50 fine per violation); North Dakota Cent. Code § 54-02-01(2) (2003) (Class B misdemeanor); Rhode Island Gen. Laws § 11-15-4 (2004) (misdemeanor; fine up to $500); South Dakota Codified Laws Ann. § 1-6-3.2 (2003) (class 1 misdemeanor); Texas Bus. & Comm. Code § 17.08(i) (2004) (Class C misdemeanor); Virginia Code Ann. § 7.1-31.1 (2004) (imprisonment up to 30 days and/or fine up to $100); and Washington Rev. Code Ann. § 43.04.070 (2004) (misdemeanor). (App. 49-82)

[44] *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 749-50 (1989).

the state seal.[45] The decision below, particularly given the conflict with *Olde Bradford*, frustrates the copyright objectives of uniformity and predictability by creating conflicting rules for selling state seal medallions.

Prior to the ruling below, vendors of patriotic medallions enjoyed some assurance – from the decision in *Olde Bradford,* § 301 of the Copyright Act, and the case law and commentary construing § 301 – that they would not risk criminal penalties for selling commemorative medallions bearing state seals. *Robart II* eliminates those assurances. Today, Pennsylvania seal medallions can be sold in Pennsylvania, but Alaska seal medallions cannot be sold in Alaska. (Compounding the confusion, Alaska seal medallions can be sold in Pennsylvania, because Pennsylvania cannot enforce Alaska's criminal laws.) But it is not possible to predict what will happen in any of the other 20-some states that prohibit commercial use of the state seal. This unpredictability will chill interstate commerce because guessing wrong leads to criminal penalties.

Especially troubling given Congress' copyright objectives is *how* the state court below arrived at the holding. To secure uniformity and predictability in the preemption arena, Congress used "the clearest and most unequivocal language possible" in 17 U.S.C. § 301 "to avoid the development of any vague borderline areas between State and

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[45] Alaska Stat. § 44.09.017 (1997 & 2004); California Gov't Code §§ 402(b), 402(c) (West 2004); Nevada Rev. Stat. § 235.010(4) (2004); New Jersey Stat. Ann. § 52:2-9 (2004); New York State Law §§ 74, 74-a (Consol. 2004); North Dakota Cent. Code § 54-02-01(1) (2003); Oregon Rev. Stat. § 390.245 (2003); South Dakota Codified Laws Ann. §§ 1-6-3.1, 1-6-3.2 (2003); Texas Bus. & Comm. Code § 17.08(b) (2004); Washington Rev. Code Ann. § 43.04.030 (2004). (App. 48-49, 51, 59-61, 63-69, 71, 73-77, 79)

Federal protection."[46] The court below nevertheless avoided this "clearest and most unequivocal language" and, instead, based its holding on principles and authorities outside the text of the Act. The court's failure to analyze the preemption issue in the terms envisioned by Congress – and the danger that other state courts will follow suit – frustrates Congress' "paramount goal" of enhancing predictability in the copyright arena.

The conflict with *Olde Bradford* will not resolve itself through "percolation" within the federal court system. The state seal statutes will be enforced in state courts with no federal court oversight. Because the sanctions are primarily small fines or imprisonment for less than six months, there is little chance that any person will ever be in custody long enough to secure federal *habeas corpus* review under 28 U.S.C. § 2254. In addition, general abstention principles will deter federal court intervention before or during a criminal prosecution in state court.[47] It is unlikely that any federal court – other than this one – will confront this issue.

D. The Court Below Incorrectly Decided the Copyright Preemption Issue.

A state law is preempted under 17 U.S.C. § 301 when two requirements, the "subject matter" and "general scope" requirements, are met:

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[46] H.R. No. 94-1476 at 129-130 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5745-46.

[47] *See, e.g., Younger v. Harris*, 401 U.S. 37 (1971) (federal courts ordinarily should not enjoin state court criminal prosecutions).

> (i) the particular work to which the state law claim is being applied "come[s] within the subject matter of copyright as specified by sections 102 and 103" – styled the "subject matter requirement"; and
>
> (ii) the state law claim seeks to vindicate "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106" – styled the "general scope requirement."[48]

The Alaska state seal statute squarely meets the subject matter and general scope requirements of 17 U.S.C. § 301 preemption analysis and it was error for the court below to conclude otherwise.

1. The Alaska State Seal Is A Graphic or Pictorial Work Within The Subject Matter Of Copyright.

A work is within the subject matter of copyright under 17 U.S.C. § 102(a) (App. 45) when it is (i) a "work of authorship," (ii) original, and (iii) fixed in a tangible means of expression. The Alaska state seal is all three.

Congress included "pictorial, graphic and sculptural works" among the categories of "work of authorship" within the subject matter of copyright.[49] The category of "pictorial, graphic, and sculptural works" includes "two-dimensional

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[48] 17 U.S.C. § 301 (App. 47-48); *see National Basketball Association v. Motorola, Inc.*, 105 F.3d 841, 848 (2d. Cir. 1997); *see also* 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright*, § 1.01[B] at 1-10 (2004) ("*Nimmer on Copyright*").

[49] 17 U.S.C. § 102(a)(5) (App. 45).

and three-dimensional works of fine, graphic, and applied art."[50] This definition plainly encompasses the Alaska state seal, a work of art that combines images of forests, fish, seals, railroads, and other symbols to celebrate Alaska's rich heritage and natural and industrial bounty.[51]

In *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, the Court emphasized the "extremely low" threshold of creativity required to satisfy the originality requirement: "[E]ven a slight amount will suffice."[52] The current seal – a refinement of a design by a draftsman in Juneau, who added symbols for mining, agriculture, fisheries, and railroads to the then-existing seal[53] – reflects sufficient creativity to clear the originality hurdle. And the depiction of the seal in the Alaska statute itself meets the fixation requirement.[54] The Alaska state seal falls squarely within Congress' definition of the subject matter of copyright.

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[50] 17 U.S.C. § 101 (App. 44-45).

[51] *See* Alaska Stat. 44.09.010 (App. 48). *See also* App. 87-88 (Robart's medallion); the March 31, 1998 trial court decision describing the seal as a "work of art" and "pretty" (App. 27, 30); and the description of the development of the seal in the November 13, 2001 trial court decision (App. 35).

[52] *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 345 (1991), *citing* 1 M. Nimmer & D. Nimmer, *Copyright* §§ 2.01[A], [B] (1990).

[53] November 13, 2001 trial court decision (describing genesis of the seal) (App. 35).

[54] Alaska Stat. 44.09.010 (App. 48); *see* 17 U.S.C. § 101 ("a work is 'fixed' in a tangible medium of expression when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived [or] reproduced") (App. 44).

2. Robart's Display And Sale Of Replicas Of The Alaska State Seal Were Within The General Scope Of Copyright.

Under the general scope requirement, a "right that is 'equivalent to copyright' is one that is infringed by the mere act of reproduction, . . . distribution, or display."[55] The Alaska statute, as applied to Robart in this case, is within the general scope requirement.

The unauthorized uses of the state seal for which Robart was convicted are identical to the 17 U.S.C. § 106 copyright rights of *reproduction* ("to reproduce the copyrighted work in copies"), *derivation* ("to prepare derivative works based on the copyrighted work"), *distribution* ("to distribute copies . . . of the copyright work to the public by sale"), and *display* ("to display the copyrighted work publicly").[56]

According to the Amended Information (App. 84-85), Robart's unauthorized use of the state seal consisted of (i) making medallions with the state seal on one side (*reproduction* or *derivation*), (ii) marketing his medallions on the QVC shopping network (*display*), and (iii) sale of two medallions to an undercover trooper (*distribution*). The "general scope requirement" is satisfied.

Under the "extra element" test, a right is not within the general scope of copyright, and there is no preemption, "if qualitatively other elements are required, instead of, or in addition to, the acts of reproduction, . . . distribution or

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[55] 1 *Nimmer on Copyright*, § 1.01[B][1] at 1-12.

[56] 17 U.S.C. §§ 106(1)-(3), (5) (App. 46-47).

display."[57] Neither the statutory requirement of "without permission" nor the additional mental state of "knowingly" (App. 84) provide the "extra element" that might save the Alaska statute from preemption.[58]

3. The Court Below Erred By Misreading Congressional Silence And Looking To Erroneous Trademark Analogies Instead of the Plain Wording of The Copyright Act.

Congress' intent to create the "clearest and most unequivocal" preemption statute in 17 U.S.C. § 301 and the experience gleaned from 25 years of 1976 Copyright Act jurisprudence required the state court below to compare the state seal to the categories of works protected under 17 U.S.C. § 102, and to compare the rights at issue to the exclusive rights set out in 17 U.S.C. § 106. The state court did not do this. Instead, the court drew the wrong inference from Congress' failure to mention state seals in the Copyright Act and relied on an erroneous analogy to trademark principles.

Because "state seals are not mentioned at all" in the federal copyright law, the court held that Congress did not intend to preempt state seal statutes. (App. 11) This

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[57] 1 *Nimmer on Copyright*, § 1.01[B][1] at 1-13; *see NBA v. Motorola*, 105 F.3d at 850 (applying "extra element" test); *Rosciszewski v. Arete Associates, Inc.*, 1 F.3d 225, 229-30 (4th Cir. 1993) (same).

[58] *See Rosciszewski v. Arete Associates, Inc.*, 1 F.3d at 230 (use of a computer "without authority" does not provide extra element that defeats preemption); *Crow v. Wainwright*, 720 F.2d 1224, 1226 (11th Cir. 1983) (element of scienter does not provide "extra element" to defeat copyright preemption).

inference from "congressional silence" disregards the statutory definition of the subject matter of copyright. Congress explicitly provided copyright protection for the categories of writings listed in 17 U.S.C. § 102. The question is not whether Congress specifically mentioned state seals, but whether a state seal fits within one of those categories. As shown in Section II.D.1 of this Petition, state seals fit squarely within the category of "pictorial, graphic and sculptural" works.

The "congressional silence" inference actually rebuts the court's reasoning below. In 17 U.S.C. § 105, Congress expressly excluded "any work of the United States Government" from the subject matter of copyright.[59] There is, however, no comparable exclusion for works of *state* governments, and "the opposite inference is required when only one specific governmental entity, the United States of America, is excluded from the protection of the Act."[60]

The state court's conclusion that the "state seal, because it is the symbol of a sovereign, is not a type of work that comes within the subject matter of copyright" (App. 9), is based on general principles lifted from Corpus Juris Secundum regarding the inherent power of States[61] and an analogy to trademark law. The court suggests that

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[59] 17 U.S.C. § 105 (App. 46). A "Work of the United States Government" is defined in 17 U.S.C. § 101 as "a work prepared by an officer of employer of the United States Government as part of that person's official duties."

[60] *National Conference of Bar Examiners v. Multistate Legal Studies*, 495 F.Supp. 34, 35 (N.D.Ill. 1980) (state agency has statutory right to obtain copyright), *affirmed in part*, 692 F.2d 478 (7th Cir. 1982) (affirming copyright validity holding), *cert. denied*, 464 U.S. 814 (1983).

[61] *Compare Robart II* (App. 9-10 and fns. 16-27) *with* 81A C.J.S. *States* § 39 (1977).

state seals are "more akin to" trademarks than copyrights because the function of state seals, like the function of trademarks, is to prevent confusion as to the source of goods and services. (App. 11-12).

The trademark analogy is wrong because this case is not about source confusion. Alaska Stat. § 44.09.015 does not require any proof of, and Robart was not charged with, deceptive or confusing use of the seal or uses that falsely imply official action.[62] The State of Alaska could modify its statute to prohibit deceptive or confusing uses of the state seal – like Vermont's statute[63] – and such a modification might provide the "extra element" that would allow the Alaska statute to survive preemption. But neither as drafted nor as applied to Robart does the Alaska statute present any issue of deceptive or confusing use.

The Alaska statute under review is "more akin to" a copyright statute than a trademark statute. Alaska authorizes the sale of official "Alaska" commemorative medallions bearing the state seal for which the state "shall receive a royalty."[64] The criminal statute under review protects this potential royalty stream from a public-private venture against competition from other private vendors such as Robart. Protecting an author's right to prohibit unauthorized copies is a core function of any copyright scheme. The lower court's failure to

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[62] In addition, the trademark analogy fails because flags and state seals are excluded from protection under the trademark law. 15 U.S.C. § 1052(b).

[63] *See* Vermont Stat. Ann. tit. 13, § 1904a (2003) (state seal can be used for commemorative medals provided it does not falsely imply state endorsement or approval) (App. 77-78).

[64] Alaska Stat. § 44.09.017 (App. 48-49).

recognize this right equivalent to copyright in the Alaska scheme was error.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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SCOTT P. ROBART, Appellant, v. STATE OF ALASKA, Appellee.

Court of Appeals No. A-8313, No. 1914

COURT OF APPEALS OF ALASKA

82 P.3d 787

January 23, 2004, Decided

COUNSEL: Matthew W. Claman, Claman Law Firm, Anchorage, for Appellant.

Douglas Kossler and Kenneth M. Rosenstein, Assistant Attorneys General, Office of Special Prosecutions and Appeals, Anchorage, and Gregg D. Renkes, Juneau, Attorney General, for Appellee.

JUDGES: Before: Coats, Chief Judge, and Mannheimer and Stewart, Judges.

OPINION BY: STEWART

OPINION:

STEWART, Judge.

A jury found Scott P. Robart guilty of using the state seal for an advertising or commercial purpose without the written permission of the lieutenant governor.[1] On appeal, Robart claims that the statute protecting the state seal, AS 44.09.015, is preempted by federal copyright law. Robart also claims that the district court erred when it refused to issue a protective order to prevent the State from arguing that the state government was unaware of Robart's use of the state seal, that the jury was not instructed on

[1] AS 44.09.015(a) & (b).

Robart's theory of the "mistake of fact" defense, and that the general verdict form used did not ensure that the jury deliberated on all the elements of his defense. For the reasons expressed below, we find that federal copyright law does not preempt AS 44.09.015, that no error occurred when the district court refused to issue the protective order, that the jury was properly instructed on the mistake of fact defense, and that the general verdict form was adequate. Accordingly, we affirm Robart's conviction.

Facts and proceedings

This case began in 1996, when an employee of the State Department of Commerce and Economic Development wrote Robart and "invited him to submit 'one or more of your company's products' for consideration for a show featuring consumer products from Alaska[.]"[2] The show was to appear on QVC, a home-shopping television cable channel. Robart decided to participate.[3] He wanted to use the state seal on a medallion commemorating the anniversary of the Alaska gold rush.

At trial, Robart testified that he did some research regarding use of the state seal, and found the statute that required him to get permission from the lieutenant governor. He called the lieutenant governor's office and was told to put his request in writing; he did so, faxing his request soon after he had called. He got no response. Although he re-faxed his request, and made another phone call, he still received no response. Consequently, he testified that he

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[2] *State v. Robart*, 988 P.2d 1114, 1114 (Alaska App. 1999).

[3] *Id.*

thought the lieutenant governor's office did not think that the state seal was important, and that the office would not enforce the statute. But he then called the governor's office, and submitted to that office the faxes he had sent to the lieutenant governor. He received no answer from the governor's office either.

Because he had been encouraged by the Department of Economic Development to submit a product, he decided to proceed and to use the state seal on a medallion without permission. Robart submitted a form showing the design of his medallion, which had a reproduction of the state seal on one side. He testified that no one from the state said anything about his not having permission. Nor did anyone tell him not to proceed until he had the permission of the lieutenant governor. Robart said that because no one said anything to him, he thought that his using the medallion without permission was not an issue for anyone in the government.

On February 1 and 2, 1997, various vendors, including Robart, displayed Alaska-made products at a trade show in Anchorage. Robart's medallion was one of those chosen to be sold on QVC. On April 17, 1997, the governor sent Robart a letter, congratulating him on his company's "selection as one of Alaska's top small businesses, and for earning the opportunity to present your product during the upcoming QVC live national broadcast."

On May 24, 1997, Robart appeared on QVC marketing a silver and gold medallion commemorating the anniversary of the 1897 Alaska gold rush.[4] A replica of the state

[4] *Id.*

seal was on one side of this medallion, while a design for the Gold Rush Centennial was on the other side.[5] John Lindback, then the lieutenant governor's chief of staff, watched the QVC show; when he saw Robart's medallion, he wondered if Robart had permission to use the state seal. Because Robart did not have permission, Lieutenant Governor Fran Ulmer, on May 29, 1997, sent him a letter, with a copy of AS 44.09.015, explaining that it had been her policy since taking office "that the state seal shall not be used for commercial purposes."[6] She told him to stop selling the medallions because he was violating AS 44.09.015.[7] Robart acknowledged receiving this letter.[8] He responded with a letter that same day. Although he claimed that he was "confused" by the lieutenant governor's position, he did not admit that he had known that he needed permission, nor did he claim that he thought he had any authorization to use the state seal.

On August 6, 1997, two months after Robart had been told to stop selling his medallions, Alaska State Trooper Curt Harris, posing as a buyer, purchased two of the medallions from Robart.[9] On August 12, 1997, shortly after this purchase, another trooper interviewed Robart. Robart told this trooper that he did not know that he needed permission to use the state seal.

The State charged Robart with using the state seal for commercial purposes without the written permission of

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[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

the lieutenant governor.[10] Robart moved for dismissal on the grounds that the statute violated his federal and state constitutional rights to free speech. The district court agreed, concluding that "the state statute violated Robart's constitutional right to freedom of speech and expression."[11] The State appealed.

On appeal, after finding that the State had a legitimate governmental interest in regulating the commercial use of the state seal, we concluded that commercial use of the state seal was not protected speech.[12] After we reversed the district court's dismissal, Robart successfully petitioned the supreme court for a hearing. When granting the petition for hearing, the supreme court ordered the parties to brief whether federal copyright law preempted AS 44.09.015. After briefing and oral argument, however, the supreme court dismissed the petition as improvidently granted.

The case then returned to the district court. There, Robart moved to dismiss the charge, arguing that federal copyright law preempted AS 44.09.015. Robart relied on the briefings that he and the State had submitted to the supreme court. Robart also submitted the transcript of the oral argument before the supreme court. Ultimately, District Court Judge John Lohff denied Robart's motion.

At trial, Robart claimed that his defense was a "mistake of fact" regarding whether he had gotten permission to use the seal. But at trial, Robart wanted the jury

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[10] *Id.*

[11] *Id.* at 1115.

[12] *Id.*

instructed that the governor (rather than the lieutenant governor) could and did give Robart written permission to use the state seal. To that end, Robart unsuccessfully sought a number of jury instructions that addressed various principles from agency law (agents and principals, and imputed knowledge), and the powers and duties of the governor. Most of these requests for instructions were denied, although the district court did agree to instruct the jury that the executive power of the state is vested in the governor, and that his office included the lieutenant governor and the governor's staff. In addition, the district court modified some of Robart's other proposed instructions. Robart also unsuccessfully sought both a protective order to prevent the State from claiming that state employees were unaware that he was using the state seal on his medallion after February 1997, and an elaborate special verdict form. A jury found Robart guilty of violating AS 44.09.015. This appeal followed.

Does federal copyright law preempt AS 44.09.015?

Robart claims that federal copyright law preempts AS 44.09.015(a), which provides that a person "may not use or make a die or impression of the state seal for any advertising or commercial purpose, unless written permission has first been obtained from the lieutenant governor."[13]

Federal copyright law is found at 17 U.S.C. §§ 100-1332 (2000). Among other things, it provides in part that

[13] Under AS 44.09.015(b), "violation of this section is a misdemeanor, and upon conviction is punishable by a fine of not more than $500, or by imprisonment for not more than six months, or by both."

"all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title." 17 U.S.C. § 301(a). Section 301(a), however, is qualified by subsection (b), which provides that "nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to" certain types of matters or actions. The first of these exceptions is "subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103 [of Title 17]."[14] The second exception does not apply in this case. The third exception addresses "activities violating legal or equitable rights that are not equivalent to any of the

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[14] Section 102(a) provides that "copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." This section then provides a list of categories of works of authorship:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works;

(7) sound recordings; and (8) architectural works. Section 102(b) provides that "in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

Section 103 applies to compilations and derivative works of the items listed in § 102, and is not applicable in this case.

exclusive rights within the general scope of copyright as specified by section 106 [of Title 17]."[15]

Robart's position is that the state seal can only be protected by the federal copyright statute. Based on copyright law, he argues that the state seal is now in the public domain and can be used freely by the public. He concludes that the state cannot pass its own statute to provide protections similar to those in the copyright statute.

The State's position is that AS 44.09.015 is not preempted, because it falls within the preemption exceptions listed in 17 U.S.C. § 301(b). The State argues that AS 44.09.015 falls within § 301(b)(1) and (b)(3). Under § 301(b)(1), federal copyright law does not preempt state

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[15] Section 106 provides that Subject to sections 107 through 121 [none of which apply in this case], the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

law that addresses rights or remedies that do not come within the subject matter of copyright as set out in §§ 102 or 103. Meanwhile, under § 301(b)(3), federal copyright law does not preempt state law that addresses rights or remedies "with respect to . . . activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright[.]" The State argues that a state seal, because it is the symbol of a sovereign, is not a type of work that comes within the subject matter of copyright.

We agree with the State – copyright law does not preempt the Alaska statute limiting the commercial use of the state seal. We believe it is clear that states have the power to protect symbols of their sovereignty.[16] For instance, the Supreme Judicial Court of Massachusetts in *Commonwealth v. R.I. Sherman Manufacturing Co.,* held that the commonwealth could prevent the use of its seal for advertising or commercial purposes.[17] Convicted of violating a statute that prohibited the use of "'the great seal of the commonwealth, [or] any representation thereof, for any advertising or commercial purpose whatever,'"[18] the defendant argued that the commonwealth had interfered both with the defendant's trademark and with the commerce clause of the U.S. Constitution. Finding that the commonwealth had appropriated its great seal "to itself as a symbol of its sovereignty,"[19] the court said that "as against the commonwealth, the defendant cannot have

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[16] The state seal is provided for in article XV, § 21, of the Alaska Constitution.

[17] 189 Mass. 76, 75 N.E. 71, 72 (Mass. 1905).

[18] *Id.* at 71.

[19] *Id.*

any claim to a trademark."[20] The fact that the commonwealth could protect its seal was to the court "too clear for argument."[21] The court also found that because the statute "merely . . . protected the seal and coat of arms of the commonwealth," it did not conflict with the commerce clause.[22]

Likewise, the federal Court of Appeals for the District of Columbia in *In re Cahn, Belt, & Co.*[23] recognized that as against a state, no person or entity can "acquire [an exclusive use] property right in the [state's] coat of arms . . . or any simulation thereof[.]"[24]

In addition, in *Katz v. Department of Motor Vehicles,*[25] the California Court of Appeals ruled that the state had "the right to protect the legitimacy, credibility and reliability of its symbols and emblems because of the substantial impact the symbols may have on public attitudes and behavior."[26] Katz had challenged the constitutionality of the state's power to prevent certain combinations of numbers, letters or both from appearing on personalized license plates.[27]

Before Congress can be said to have preempted an area that has traditionally been occupied by the states, "congressional intent to supersede state laws must be

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[20] *Id.* at 72.

[21] *Id.*

[22] *Id.*

[23] 1906 Dec. Comm'r Pat. 627, 27 App. D.C. 173 (1906).

[24] *Id.* at 177.

[25] 32 Cal. App. 3d 679, 108 Cal.Rptr. 424 (Cal. App. 1973).

[26] *Id.* at 428.

[27] *Id.* at 425.

'clear and manifest.'"[28] Here, federal copyright law is silent on this issue – state seals are not mentioned at all. Additionally, we cannot find a single federal or state case discussing the application of federal copyright law on laws protecting state seals. Nor have we – or the parties – found any other evidence that Congress intended to preempt the states' ability to protect and regulate their state seals.

Moreover, state seals appear to be more akin to trademarks or service marks than they are to the type of work Congress intended copyrights to cover. The federal trademark statute – unlike the copyright statute – specifically provides for state flags, coats of arms, or other insignia by prohibiting them from being registered. *See* 15 U.S.C. § 1052 (2000). Additionally, the majority of cases addressing state seals are trademark cases;[29] there are no copyright cases addressing this issue.

Although we recognize that trademark and copyright law can overlap,[30] generally speaking, the two schemes address different concerns. Under the copyright statute, an author secures "the sole right to copy the protected work and to license others to produce copies."[31] The copyright

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[28] *Totemoff v. State*, 905 P.2d 954, 958 (Alaska 1995) (citations omitted).

[29] *See R.I. Sherman Mfg. Co.*, 75 N.E. at 71; *In re Cahn, Belt, & Co.*, 27 App. D.C. at 173.

[30] *See, e.g., Bicentennial Comm'n. v. Olde Bradford Co.*, 26 Pa. Commw. 636, 365 A.2d 172, 176 (Pa. 1976) ("Although the laws governing copyrights and trademarks may overlap as applied to a single item, they are intended to grant quite different forms of protection to their holders.").

[31] *Id.* (citation omitted).

holder may not only "exploit his work commercially, [but] may also exercise the copyright in a purely proscriptive manner to prevent anyone from copying the protected work."[32] Trademarks, however, are based on common law concepts of unfair competition; hence, the purpose of a trademark is to "prevent confusion as to the origin of goods or services and to prevent fraud and misrepresentation as to their source."[33] Here, AS 44.09.015 does not provide the equivalent of copyright protection; rather, it provides protection analogous to trademark protection.

Finally, as the State points out, despite the broad sweep of federal copyright law, and despite a specific statute that places all federal government work in the public domain,[34] Congress has passed a statute protecting symbols similar to a state seal. Under 18 U.S.C. § 713(a) (2000), Congress has protected the great seal of United States, the seals of the President and the Vice President of the United States, the seal of the United States Senate, the seal of the United States House of Representatives, and the Seal of the United States Congress. Although Section 713(a) makes it a crime to use any of these seals "for the purpose of conveying . . . a false impression of sponsorship or approval by the Government of the United States," subsections (b), (c), (d), and (e) generally make it a crime merely to manufacture, reproduce, use, sell, or purchase any likeness of these seals (except the great seal of the United States) without permission from the appropriate agency. It seems evident that Congress, by protecting specific important federal seals that were left

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[32] *Id.*

[33] *Id.*

[34] *See* 17 U.S.C. § 105.

unprotected by copyright law (and by federal trademark law), did not intend to prohibit states from protecting seals that represent state sovereignty.

For all the above reasons, we conclude that federal copyright law does not preempt AS 44.09.015, which protects the state seal from unauthorized commercial use.

Robart's requested protective order

Robart claims that he was entitled to a protective order that prevented the State's witnesses from claiming that they did not know that he was using the state seal after state employees saw it as part of his initial submission for the trade show. Robart based this request on his claim that under the theory of "imputed knowledge," the knowledge of one state employee must be imputed to all other state employees. After hearing argument, Judge Lohff denied Robart's motion. We find no error. Even assuming that Robart's theory of "imputed knowledge" among state agencies and employees was applicable in this case, Robart was convicted for using the state seal after the lieutenant governor expressly informed him that he was doing so illegally. It was not relevant what other state employees knew before Robart was warned. (Moreover, under Robart's "imputed knowledge" theory, when the lieutenant governor told him to stop using the seal, she acted on behalf of the governor.)

Additionally, Robart has not shown how he was prejudiced. No State witness testified that they were ignorant of Robart's use of the state seal. In his reply brief, Robart argues that he wanted the protective order to prevent the State from arguing that the governor could not or did not give him permission to use the state seal. But he

did not present this reason to Judge Lohff, nor – for the reasons explained in the next section – was Robart entitled to a protective order that prevented the State from making this argument.

Was the jury instructed on Robart's theory of defense?

Robart next claims that Judge Lohff should have given Robart's proposed jury instructions because these "instructions . . . described and defined Robart's theory of defense." At trial Robart characterized his defense as a mistake of fact, but he claimed that to establish this defense, he was entitled to have the jury instructed on general principles of corporate agency law. To that end, Robart sought instructions that defined "agent" and the scope of an agent's authority. He also wanted the jury instructed that an act or omission of state employees was the act or omission of the governor, and that any act or omission of any state employee, including the governor and the lieutenant governor, was the act or omission of the state.

Most importantly, however, Robart wanted the jury instructed that both the governor and the lieutenant governor could grant permission to use the state seal. Robart's desired defense, and his agency instructions, were based on the notion reflected in this last instruction: that because the governor is the head of the executive branch, he has the same authority as the lieutenant governor over the state seal. Judge Lohff properly rejected this instruction because it is not supported by the constitution or AS 44.09.015.

The Alaska Constitution provides that the lieutenant governor "shall perform such duties as may be prescribed

by law and as may be delegated to him by the governor."[35] With regard to the state seal, the lieutenant governor has duties prescribed by law. In AS 44.19.022, the legislature expressly made the lieutenant governor the custodian of the state seal. Likewise, in AS 44.09.015, the legislature granted the lieutenant governor the authority to grant permission to use the state seal for a commercial use. These statutes show a clear legislative intent that the lieutenant governor has authority to permit use of the state seal for a commercial or advertising purpose. Although the governor can, by "appropriate court action or proceeding . . . enforce compliance with any constitutional or legislative mandate"[36] nothing in the constitution allows the governor to supplant the lieutenant governor with regard to that person's "duties . . . prescribed by law."

Hence, Judge Lohff properly rejected Robart's instructions because they misstated the law – that is, contrary to statute, they told the jury that the governor could grant permission to use the state seal.

Although Judge Lohff rejected Robart's assertion that the governor, as a matter of law, had the authority to grant permission to use the state seal, Judge Lohff allowed Robart to present a legitimate mistake of fact defense. Judge Lohff instructed the jury that "to prove that the defendant did not act under a reasonable mistake of fact, the state must prove" that "the defendant's mistaken belief that he had permission from the lieutenant governor to use a die or impression was not reasonable" and that "the defendant's reliance on a course of communication with

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[35] Alaska Const. art. III, § 7.

[36] *Id.* art. III, § 16.

the governor or the lieutenant governor in reaching his belief was not reasonable." This defense was based on evidence of the state's consistent failure to respond to Robart's requests for permission, on the encouragement to produce the medallions, and on the congratulatory letter from the governor. This defense properly allowed Robart to argue to the jury that the state, by its actions, "led him to believe that the State permitted his use of the seal."

We conclude that Judge Lohff did not err when, rejecting Robart's characterization of the mistake of fact defense, he denied Robart's proposed jury instructions.

Robart also claims that error occurred when, at the end of trial, Judge Lohff changed two instructions that he had given at the beginning of trial, when he gave the jury some preliminary instructions. Of these, one explained the elements of the offense, while another explained the elements of the defense. In each of these, however, the preliminary instructions omitted the statutory requirement that Robart have "written" permission from the lieutenant governor to use the state seal for a commercial purpose. Later, when discussing the final instructions, the State pointed out that these instructions, to accurately set out the elements of the statute, had to have the word "written" added. Judge Lohff agreed, but Robart objected.

On appeal, Robart argues that changing the preliminary instructions "vitiated" his defense. But Judge Lohff was required to instruct the jury on the essential elements of the offense.[37] Moreover, the defense of mistake of fact

[37] *See Sears v. State*, 713 P.2d 1218, 1219 (Alaska App. 1986) ("The trial court is under a duty to instruct the jury on the essential elements of the offense.").

instruction did not require that the permission be in writing. The language of this instruction allowed Robart to argue, based on the encouragement he received from state agencies and on his correspondence with the governor and the lieutenant governor, that he had a reasonable "mistaken belief *that he had permission* from the lieutenant governor" to use the state seal.

In addition, Robart has not shown how his defense was prejudiced. The record shows that prior to trial he was clearly placed on notice by both the statute and the charging document that he had to have written permission to use the state seal. Before trial, Robart's position was that the governor's April letter was "specific written permission" to use the seal. As for his defense, Robart did not claim in his opening statement that he had written or unwritten permission to use the seal. Instead, he asserted that it had been a reasonable mistake of fact for him to rely on the pattern of non-response from the lieutenant governor, the letter from the governor, and the encouragement he received from other state agencies. In addition, Judge Lohff told Robart early in the trial that he could argue as part of his mistake of fact defense that he had reasonably considered that this letter constituted "written permission" to use the state seal. We conclude that Judge Lohff did not err when he corrected the erroneous preliminary instructions. Under the circumstances of this case, Robart's defense was not prejudiced.

Robart's other requested instructions

Robart also claims that his theory of defense required the trial court to instruct the jury that the State could not claim that it was ignorant of the law and to apply the

definition of "writing" that is included in the Uniform Commercial Code. Robart further claims that the jury should have been given an elaborate definition of what constitutes "acting unreasonably." He also claims that to ensure that the jury considered his defense, he was entitled to a special verdict form. Judge Lohff refused to give the first instruction, and modified the other two; he also rejected Robart's proposed special verdict form.

Although the trial judge must instruct the jury on the essential elements of an offense or a defense, the trial judge has broad discretion to decide what other instructions to give the jury.[38] Here, we find no abuse of discretion.

Robart argues that the first of these instructions was important because he relied on the government to warn him that he did not have permission to use the seal. But even assuming that such an instruction would ever be warranted in a criminal case, Robart was warned by the lieutenant governor to stop using the state seal;[39] Robart was charged for using the state seal only after he ignored that warning.

Robart next argues that his other two requested instructions were necessary to allow him to present his defense. But "as long as the instructions actually given by the trial court adequately set forth the applicable law, a more elaborate explanation of the defendant's theory of the case" is not required unless it "would substantially aid the jury in arriving at a just verdict."[40] The instructions as

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[38] *Stoneking v. State,* 800 P.2d 949, 950 (Alaska App. 1990).

[39] *Robart,* 988 P.2d at 1114.

[40] *Lee v. State,* 760 P.2d 1039, 1041 (Alaska App. 1988).

given by Judge Lohff adequately informed the jury as to what constitutes a "writing" under AS 44.09.015, and as to what "acting reasonably" means. Here, the jury was instructed that a writing "includes printing, typewriting or any other intentional reduction to tangible form." From this, Robart was allowed to argue that the governor's congratulatory letter, despite its lack of relevant language, was a "writing." Meanwhile, the jury was instructed that "acting reasonably" meant that "in deciding whether a party acted reasonably or unreasonably, you may consider what a reasonably prudent person would do under similar circumstances" and that "acting reasonably may consist of doing something that a reasonably prudent person would do, or it may consist in not doing something that a reasonably prudent person would not do." Again, this was sufficient to allow Robart to argue that he had acted reasonably, and that the State had acted unreasonably.

Accordingly, we conclude that no error occurred by the rejection or modification of these three instructions.

Judge Lohff also rejected the special verdict form. Robart argues that the special verdict form was required to ensure that the jury properly considered the elements of his mistake of fact defense. He made a similar argument below, but Judge Lohff rejected this argument and found that the jury could follow the instructions setting out Robart's defense. We conclude that Judge Lohff did not abuse his discretion by using a general verdict form.

Conclusion

Robart's conviction is AFFIRMED.

STATE OF ALASKA, Appellant, v. SCOTT P. ROBART, Appellee.

Court of Appeals No. A-7013, No. 1649

COURT OF APPEALS OF ALASKA

988 P.2d 1114; 1999 Alas. App. LEXIS 111

October 8, 1999, Decided

COUNSEL: Eric A. Johnson, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellant.

Matthew W. Claman, Anchorage, for Appellee.

JUDGES: Before: Coats, Chief Judge, and Mannheimer and Stewart, Judges.

OPINION BY: STEWART

OPINION: OPINION

STEWART, Judge.

Alaska law forbids a person to use the official state seal "for any advertising or commercial purpose"[1] without permission from the Lieutenant Governor. In this case, we hold that this law does not violate freedom of speech and that the State can prosecute a person who manufactures and sells coins that use the state seal without permission.

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[1] AS 44.09.015.

Facts and proceedings

On December 16, 1996, W.G. Paulick, an employee with the State Department of Commerce and Economic Development, wrote Robart and invited him to submit "one or more of your company's products" for consideration for a show featuring consumer products from Alaska on QVC, a home-shopping television channel. On May 24, 1997, Robart appeared on QVC and marketed a gold and silver coin commemorating the anniversary of the 1897 gold rush with the state seal on one side and a trademarked (not by Robart, although he did have permission to use this logo) design for the Gold Rush Centennial on the other side.[2] On May 29, Lieutenant Governor Fran Ulmer wrote a letter to Robart stating that "it has been my policy since taking office that the state seal shall not be used for commercial purposes." Ulmer asked Robart to stop selling the coins because it violated AS 44.09.015. Also, she enclosed a copy of that statute.[3] Robart acknowledged receiving the letter.

Almost two months later, Alaska State Trooper Steve Garrett wrote to Robart, posing as a person interested in buying some of Robart's coins. On August 6, another trooper, Curt Harris, posed as a buyer and bought two of the coins from Robart that bore the state seal on one side.

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[2] Robart's design added the words "TROY OZ .999 FINE SILVER" onto the state seal. Robart does not argue that adding these words transformed the state seal into an original work of art or into something that is not the state seal.

[3] In the letter, Lt. Gov. Ulmer stated that she had "turned down a request last October from another business in Anchorage to use the state seal on a Gold Rush commemorative coin."

The State then charged Robart with using the seal of the State of Alaska for commercial purposes without permission from the State.

Robart filed a motion to dismiss the case, contending that AS 44.09.015 was unconstitutional and that his conduct in marketing the coins with the official state seal was free speech protected by the First Amendment and by article I, section 5 of the Alaska Constitution. District Court Judge William H. Fuld dismissed the criminal case because he concluded that the state statute violated Robart's constitutional right to freedom of speech and expression.

Discussion

Commercial use of the state seal is not protected speech.

Alaska Statute 44.09.010 creates the "official seal of the State of Alaska." Alaska Statute 44.09.015 prohibits using that seal for advertising or commercial purposes without permission.[4] Robart's conduct in this case was marketing products bearing the state seal – specifically, commemorative coins or medallions with the state seal on

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[4] AS 44.09.015 provides:

(a) A person may not use or make a die or impression of the state seal for any advertising or commercial purpose, unless written permission has first been obtained from the lieutenant governor.

(b) Violation of this section is a misdemeanor, and upon conviction is punishable by a fine of not more than $500, or by imprisonment for not more than six months, or by both.

one side and a design for an Alaskan theme on the other side.

On its face, AS 44.09.015 proscribes only commercial speech. We note that several other jurisdictions have enacted laws protecting the official symbols from commercial use, but have apparently not passed on the constitutionality of these laws.[5]

In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee,*[6] the Supreme Court considered an attack on a federal statute that granted the exclusive right for the commercial use of the word "Olympic" to the United States Olympic Committee. That statute authorized the United States Olympic Committee to preclude the unauthorized use of the word "Olympic" "for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition."[7] The Court noted that Congress had enacted several similar statutes, some of which provided for civil remedies and some of which provided for criminal penalties.[8]

SFAA argued that the statute violated the First Amendment. The Court held, "Congress' decision to grant the USOC a limited property right in the word 'Olympic'

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[5] *See, e.g.*, Cal. Gov't Code § 402; Haw. Rev. Stat. § 5-6; Me. Rev. Stat. Ann. tit. 1, § 204; R.I. Gen. Laws § 11-15-4; S.D. Codified Laws § 1-6-3.1; Tex. Bus. & Com. Code Ann. § 17.08; Wash. Rev. Code Ann. § 43.04.050; 18 U.S.C. § 713.

[6] 483 U.S. 522, 107 S. Ct. 2971, 97 L. Ed. 2d 427 (1987).

[7] 36 U.S.C. § 380.

[8] *San Francisco Arts & Athletics, Inc.*, 483 U.S. at 532 n.8.

[fell] within the scope of trademark law protections, and thus certainly within constitutional bounds."[9] The Court reasoned that, to the extent the statute restricted the uses of the word "Olympic" "for the purpose of trade [or] to induce the sale of any goods or services," the statute regulated "commercial speech," which "receives a limited form of First Amendment protection."[10] The Court recognized that the statute would prohibit some non-commercial uses of the word "Olympic."[11] Still, the court rejected SFAA's First Amendment claim: "Even though [the statute's] protection may exceed the traditional rights of a trademark owner in certain circumstances, the application of the Act to this commercial speech is not broader than necessary to protect the legitimate congressional interest and therefore does not violate the First Amendment."[12]

We find the reasoning of the United States Supreme Court persuasive. Alaska Statute 44.09.015 regulates commercial speech only "for any advertising or commercial purpose." Because it does not impact any non-commercial uses of the state seal, the potential restriction of speech is narrower than that of the statute in *San Francisco Arts & Athletics*. The State has a legitimate governmental interest in regulating the commercial use of the state seal. We conclude that the First Amendment does not bar the State's prosecution of Robart for marketing commemorative coins bearing the official state seal, a commercial

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[9] *Id.* at 534-35.

[10] *Id.* at 535

[11] *Id.*

[12] *Id* at 540.

activity, because Robart used the state seal without permission.

Robart also relies on article I, section 5 of the Alaska Constitution. ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.") Our supreme court has held that the protection provided by this section is "at least as broad as that of the First Amendment of the United States Constitution."[13] However, Robart has not convinced us that this provision of the Alaska Constitution provides broader protection for commercial speech than the First Amendment.

Conclusion

We REVERSE the district court's order dismissing the case and REMAND for further proceedings.

[13] *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982) (citations omitted).

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA	)
Plaintiff,	)
vs.	)
SCOTT PETERSON ROBART,	)
Defendant.	)

Case No. 3ANS 97-6951 CR

MEMORANDUM AND DECISION

(Filed Mar. 31, 1998)

This case raises interesting issues of free speech under the United States and State of Alaska constitutions. The facts are as follows:

Defendant Scott Robart owns a small business, Commemorative Designs, based in Anchorage, Alaska. The defendant, Mr. Robart, taking advantage of a marketing opportunity through the QVC cable channel, produced a silver coin commemorating the [1897]-1997 Alaska Gold Rush Centennial. The coin is admitted into evidence as exhibit G. I find exhibit 1 is an actual impression of the official state seal.

> AS 44.09.015 provides that use of seal without permission is prohibited. (a) A person may not use or make a die or impression of the state seal for any advertising or commercial purpose, unless written permission has first been obtained from the lieutenant governor. (b) Violation of this section is a misdemeanor, and upon conviction is

> punishable by a fine of not more than $500, or by imprisonment for not more than six months, or by both.

On May 24, 1997 the QVC television shopping network held a sale of Alaska products and the defendant, doing business as Commemorative Designs, marketed a silver coin commemorating the anniversary of [1897] gold rush and bearing the seal of the State of Alaska on one side. (See exhibit G and Robart's testimony) On May 29, 1997, Lt. Governor Ulmer wrote defendant and told him the use of the state seal without her permission was a violation of AS 44.09.015. She asked him to stop. Subsequent investigation by state troopers showed that Robart continued to market the coins, although on a limited basis. The coins were sold for between $25 to $28 apiece (see page 2 and 3 of the state's Opposition to Motion to Dismiss, which accurately recites the facts. This prosecution was then commenced. Defendant claims the statute violated his state and federal constitutional right of free speech.

The court heard testimony about the use of the state seal in commercial tourist oriented art and was shown cheap replicas of the state seal. However, the issue before the court is whether this use of the state seal is art or speech. The court concludes that it is protected speech and it is art. The state seal is a work of art. The state claims that what we have here is not speech and there is no message and therefore there is no constitutional protection. The message, the court concludes, is in the eye of the beholder and this court concludes that, although there is no clear message in this art, whatever he seeks to convey is protected (See *Mickens v. City of Kodiak*, 640 P.2d at 818 (Supreme Court Justice Matthews 1982). The courts

and police should not be artistic constables See *Mickens* (Footnote 5)

> . . . "the customary 'barroom' type of nude dancing," involving "only the barest minimum of protected expression." To distinguish between the two, however, would be to cast on the police and courts the "anomalous duty of serving as . . . artistic constables," evaluating the artistic worth and tasteful quality of the performance in its total context. Moreover, the artistic preferences and prurient interests of the vulgar are entitled to no less protection than those of the exquisite and sensitive esthete.

Page 822

> Discrimination on the basis of the content of protected forms of expression cannot be tolerated except where there are "clear reasons" for it.

The state argued that there was no reason to distinguish between the civil cases relied upon in this criminal prosecution and the criminal cases such as the flag burning case, *Johnson v. Texas*, 491 S. Ct. 397 (1989), relied upon by the defense. Justice Burke in *Mickens* said the important difference between the ordinance in this (*Mickens*) and the statute held enforceable in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) is that the statute in *Bellanca* did not attempt to impose criminal penalties on those persons performing in violation of its terms. While the reasoning in the *Olympic* case *San Francisco Arts and Athletics v. United States Olympic Committee*, 483 U.S. 522 (1987) was supported by a majority of the United States Supreme Court and see *Board of Governors of the University of North Carolina v. Helpingstine*, 714 F. Supp. 167 (M.D.

N.C. 1989), these are both civil cases. The state, in this case, could certainly register the seal with the Trademark Office and seek trademark protection and litigate the issues of whether it has lost a proprietary interest because of common use.

Where is the justification for making it a crime to use the seal for commercial purposes. Is there a risk of fraud or other criminal conduct which is specifically referred to in the federal statute on the use of the federal seal? The holding of *Mickens* is that suppression of expression cannot be allowed unless there are clear reasons for it. At 822. Thus, I conclude that the state cannot make it criminal to reproduce copies of the state seal, the state flag, the state flower or whatever other items of art to which the state may claim ownership.

It is interesting, that when one reads the *U. S. Olympic* opinion, supra, the federal legislation does not make it a crime to use the word "olympic". An older statute making it a crime to use the word olympic was noted to be unworkable as it required criminal intent i.e. an intent to deceive. The reasons behind the majority opinion is that the investment in the term olympic and olympics justifies protection. This is not a case of government action. Thus Justices [sic] Brennan's dissent at page 562 is more on point, " . . . the act is over broad and prohibits even acts that are noncommercial or expressive". The act gives unfettered discretion to the United States Olympic Committee. Justice Brennan continued in stating that a "law subjecting the exercise of first amendment freedoms to the prior restraint of a license without narrow objective and definite standards to govern the licensing authority is unconstitutional." at 568 "Proof of abusive power is not needed to strike a statute that limits or controls ideas." Id.

Language even in a commercial context properly belongs to the public unless the state's interest is substantial and the limitation is no more extensive than necessary to serve the interest. at 573 The words of Justice Brennan apply to this criminal prosecution and this statute which is over broad, over restrictive and most important [sic] criminal. There would have been a different decision in the *Olympic Committee* and in *The University of North Carolina* case if the art and speech had resulted in the defendants going to jail.

The state points out that defendant was not making a political statement like Johnson in *Texas v. Johnson* in that his medallion had no expressive content. Further, the state argues that conceding that there may be some expressive conduct, the interest of the state in its state seal, is adequate to justify the restriction on its use (see page 9 of the state's brief). The answer to that argument is that clearly the medallion has some meaning as a work of art. It is pretty. The state has not shown any justification for making it a crime to produce a work of art. There is no claim by the state or by the legislation that there was any intent to defraud or to pass the emblem off as a product of the state.

The state argues that there are other states with similar laws to Alaska's. This is true. The court has looked at the laws of Alabama, Arizona, California, Maine and Washington as cited in the state brief, page 11. Interestingly enough, there are no reported prosecution [sic] under those state laws, making that argument not very persuasive. Those laws have not be [sic] challenged.

In conclusion, the court finds that Section 5, Article I of the Alaska Constitution which provides:

> every person may freely speak, write and publish on all subjects being responsible for the use of that right . . .

protects Mr. Robart. In conclusion, the state can protect the seal by a more narrowly drawn criminal statute prohibiting fraudulent use of the state seal. The state can protect the use of the state seal for commercial purposes by seeking trademark and copyright protection. The cases relied on by the state are really trademark and copyright cases and the state may protect its seal in that manner. For the reasons stated in this opinion and the arguments of counsel, the Motion to Dismiss is GRANTED.

DATED at Anchorage, Alaska this 31 day of March, 1998.

/s/ William H. Fuld
WILLIAM H. FULD
District Court Judge

WHF:dc

In the Supreme Court of the State of Alaska

Scott P. Robart, Petitioner,	)	Supreme Court No. **S-09393**
v.	)	**Order**
State of Alaska, Respondent.	)	Petition for Hearing Date of Order: **6/2/00**

Trial Court Case # **3AN-97-06951CR**
Court of Appeals # **A-07013**

Before: Matthews, Chief Justice, Eastaugh, Fabe, Bryner, and Carpeneti, Justices

On consideration of the Petition for Hearing, filed on 10/25/99, and the response, filed on 11/23/99,

IT IS ORDERED:

1. The Petition for Hearing is **Granted**. Briefing shall address only the following issues: (a) whether AS 44.09.015 is preempted by federal copyright law;[1] (b) whether Robart's coin is commercial speech or art; (c) whether AS 44.09.015 violated Robart's First Amendment rights; (d) what interest the state claims is furthered by AS 44.09.015 – including what type of ownership the state has in the seal, e.g., trademark, copyright, or some hybrid of the two; (e) whether the state's interest is substantial; (f) whether AS 44.09.015 directly furthers that interest; (g) whether AS 44.09.015 is no broader than necessary to

[1] *See, e.g., Bicentennial Comm. v. Olde Bradford Co.*, 365 A.2d 172 (Pa. 1976).

advance the state's interest; (h) whether the lieutenant governor has adopted any criteria for granting or denying permission for commercial use of the seal; and (i) whether those criteria have been published or are otherwise publically available.

2. Formal briefs conforming to Appellate Rule 212 and excerpts conforming to Appellate Rule 210 shall be filed. The petitioner's opening brief and excerpt shall be served and filed on or before **7/5/00**. Briefing and excerpting shall thereafter proceed on the schedule prescribed in Appellate rule 212(a)(1).

3. Either party may request oral argument within the time allowed by Appellate Rule 213(a).

Entered by direction of the court.

MATTHEWS, Chief Justice, would deny the petition.

Clerk of the Appellate Courts

/s/ C. Peterson
Deputy Clerk

cc: Supreme Court Justices
Court of Appeals Judges
Judge Fuld
Central Staff
Trial Court Appeals Clerk – Anchorage

In the Supreme Court of the State of Alaska

Scott P. Robart, Petitioner(s), v. **State of Alaska,** Respondent(s).	Supreme Court No. **S-09393** **Order** Petition for Hearing Date of Order: **5/21/01**

Trial Court Case # **3AN-97-06951CR**
Court of Appeals # **A-7013**

Before: Fabe, Chief Justice, and Matthews, Eastaugh, Bryner, and Carpeneti, Justices

IT IS ORDERED:

The Petition for Hearing is **DISMISSED** as improvidently granted.

Entered by the direction of the court.

Clerk of the Appellate Courts

/s/ Marilyn May
Marilyn May

cc: Supreme Court Justices
COA Judges
Judge Fuld
Central Staff
Trial Court Appeals Clerk

IN THE DISTRICT COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
Plaintiff,)
vs.)
SCOTT PETERSON ROBART,)
Defendant.)

Case No. 3AN S97-6951CR

DECISION DENYING DEFENDANT'S MOTION TO DISMISS

The procedural history of this case is somewhat lengthy. It is set out in part in the Court of Appeals opinion *State v. Robart*, 988 P.2d 1114 (Alaska App. 1999). That opinion reversed a decision of Judge Fuld who had dismissed this case. Judge Fuld had found the defendant's use of the seal of the State of Alaska for a gold and silver coin was protected speech under the First Amendment. The Court of Appeals disagreed. Defendant petitioned for a hearing before the Alaska Supreme Court, and a hearing was granted.

The matter was argued at the Supreme Court and then the Supreme Court decided the petition was improvidently granted. This matter was then remanded to this court for trial.

Now defendant has moved to dismiss using some of the arguments submitted to the Supreme Court in the petition for hearing. In general defendant claims the federal preemption of copyright law bars the current state

prosecution of him. The court disagrees and denies the motion for the reasons set out below.

The exact nature of the state seal of Alaska is somewhat elusive. The history of the state seal is fairly clear. The current state seal is a modification of earlier designs. According to the web site FAQALASKA and the *Alaska Blue Book* 1993 94, 11th ed., Juneau, Department of Education Division of State Libraries, Archives Museums, in 1884, the first governor of the District of Alaska designed and had made a seal for the District of Alaska. This seal was used until 1910 when Governor Walter E. Clark decided the design placed too much emphasis on icebergs, northern lights and native people.

The governor had a draftsman in Juneau add new features to the existing seal including symbols for mining, agricultural, fisheries, fur seal rookeries, and a railroad. The acting Attorney General of the United States then approved the design. A more refined version was made by an unknown person in the Department of the Interior. When Alaska changed from a district to a territory in 1912, the new seal was adopted.

When Alaska became a state, the existing seal for the Territory of Alaska was maintained for the new state. The Alaska Constitution at Article XV, Section 21 states:

The Seal of the Territory, substituting the word "State" for "Territory," shall be the seal of the State.

Thus the design of the state seal, excepting the word "State" has been protected under federal rules for nearly fifty years.

The basis for the current prosecution is an allegation that the defendant used the state seal without permission. Alaska Statute 44.09.015 states:

> (a) A person may not use or make a die or impression of the state seal for any advertising or commercial purpose, unless written permission has first been obtained from the lieutenant governor.

Alaska Statute 44.19.022 also states the Lieutenant Governor is the custodian of the state seal.

So what then is the nature of the state seal? The State asserts that it descends from the role seals played in authenticating documents from centuries past. This court finds this argument persuasive. One has only to look at a current driver's license to see the seal is used in two ways. A black ink form of the seal is in the background with the driver's picture. A holographic or three-dimensional form of the state seal is also used on the plastic cover of the driver's license to show the license is authentic.

Defendant asserts the state seal is just a piece of art that has become a part of the public domain, or an image the copying of which is only protected under federal copyright law. If this were true, then the State of Alaska would no longer truly possess the one image it has to authenticate state documents. See for instance page iii of Volume 1 of Alaska Statutes where the Lieutenant Governor authenticates the law books as prima facie evidence of the laws of Alaska. Defendant does not cite any case law that holds the state seal of Alaska is in the public domain.

The defendant does cite to *Bicentennial Commission v. Olde Bradford Co., Inc.,* 365 A.2d 172 (Pa. 1976) claiming it is authority that Alaska cannot prevent copying the

state seal. The case does hold that a Pennsylvania Bicentennial act that prohibited copying of the Bicentennial Seal was preempted by federal copyright law. The Pennsylvania court found the Bicentennial Commission seal was in the public domain, and therefore federal copyright law preempted a Pennsylvania law that prohibited copying. Defendant has not shown the Alaska seal is in the public domain and therefore this case offers no help in the present case.

The court finds the state seal of Alaska is the functional equivalent of the trademark of Alaska. Under federal trademark law, 15 USC 1052(b), the state seal cannot be a trademark for any private person. But the State of Alaska can and does possess the rights to the state seal.

Because the State does possess the rights to the state seal, it has the opportunity to use it for authorized fund raising purposes such as granting a use for commemorative annual medallions under AS 44.09.017. As a further method of the control of the commercial use of the state seal, the State is authorized to regulate the use of the state seal as set out in AS 44.09.010.

Thus this court finds the statute under which the defendant is charged, is not preempted by federal copyright or trademark laws.

Dated at Anchorage, Alaska, this 13th day of November, 2001

/s/ John R. Lohff
JOHN R. LOHFF
District Court Judge

IN THE DISTRICT COURT FOR THE STATE OF ALASKA AT ANCHORAGE

JUDGMENT

☑ State of Alaska ☐ Municipality of Anchorage Count ____
vs.
Defendant: Scott Robart CASE NO. 3AN-S97-6951 CR
DOB 4-15-48 Address: _____

Defendant is:
☒ **GUILTY** of Illegal use of state seal
Statute/Ordinance: _____
☐ **NOT GUILTY.** It is ordered that defendant is acquitted and discharged

PLEA: ☐ Not Guilty ☐ Guilty ☐ No Contest
RULE 11(e) PLEA: ☐ Yes ☐ No ☐ Partial
TRIAL: ☐ Court ☒ Jury
DV Offense per AS 18.66.990(3)&(5): ☐ Yes ☒ No
Sex Offender Registration Per AS 12.63.010 Required: ☐ Yes ☒ No

☒ **SUSPENDED IMPOSITION OF SENTENCE.** Imposition of sentence is suspended and defendant is placed on probation for 6 mo., subject to the conditions listed in the Direct Court Orders section and the Probation section below.

SENTENCE IS IMPOSED AS FOLLOWS:

DIRECT COURT ORDERS

1. FINE $250 with $_____ suspended. **Due** 90 da. Bail to Fine $_____ ☐ Fees paid to court-ordered programs will be credited to fine if defendant presents proof of payment to clerk by above due date.

2. SURCHARGE **due within 10 days.** ☒ $50 (Misd) ☐ $10 (infraction) ☐ None (Fine Under $30)

3. JAIL ____ days with _____ days suspended. **Report at** 7:45 a.m. on _____ to the Cordova Center, 130 Cordova Street, Anchorage.

4. ☐ Defendant is ordered to complete the treatment recommended by the Anchorage Alcohol Safety Action Program (AASAP) and pay costs. Report to AASAP within 5 days. This may include residential treatment up to _____ days plus required aftercare in addition to any jail time ordered above. *See "Instructions for Defendant After Sentencing."*

5. ☐ Defendant is ordered to perform _____ hours Community Work Service (CWS) within/by _____ ☐ CWS not completed will convert to 3 hours of jail per CWS hour.

6. ☐ Defendant is ordered to make restitution to _____ for uninsured loss of $ _____ due _____ days after amount is set by the court. *See "Instructions for Defendant After Sentencing".*

7. ☐ Defendant is ordered to _____
_____

CONDITIONS OF PROBATION. Defendant is placed on probation for 6 ~~years~~/months subject to the following conditions:

8. ☒ Comply with all direct court orders listed above by the deadlines stated and follow the instructions on the *"Instructions for Defendant After Sentencing"* form that was given to you at sentencing.

9. ☒ Commit no jailable offenses during the period of probation.

10. ☐ Complete a domestic violence intervention program. Pay monitoring fees and program costs. Within five days of sentencing, register with the Domestic Violence Monitoring Program as explained in "*Instructions for Defendant After Sentencing*".

11. ☐ Have no contact, direct or indirect, with _____ unless that person's written consent has been supplied to the Prosecutor's Office.

12. Other: _____

_____

COST OF COUNSEL (If Appointed). Unless you object within 10 days, the court will enter a judgment against you for the cost of appointed counsel in the amount of ☐ $500 (Trial) ☐ $200 (Change of Plea) ☐ $_____ (Actual Costs). Reasons for waiving schedule of costs: _____

_____.

You may use form CR-531, available in the Clerk's Office, to file your opposition.

I certify that on 4-9-02 a copy of this judgment was given to
☑ Def/Atty ☑ Prosecutor
☐ AASAP ☐ DVMP ☐ Jail
IN-COURT CLERK: ts

/s/ John R. Lohff / 4/9/02
District Court Judge/ Effective Date
Magistrate
Print Name: J.R. LOHFF

In the Supreme Court of the State of Alaska

Scott P. Robart, Petitioner, v. **State of Alaska,** Respondent.	Supreme Court No. **S-11373** **Order** Petition for Hearing Date of Order: **5/17/04**

Trial Court Case # **3AN-97-06951CR**
Court of Appeals # A-8313

Before: Bryner, Chief Justice, and Matthews, Eastaugh, Fabe, and Carpeneti, Justices

On consideration of the Petition for Hearing filed on 3/5/04 and the response filed on 4/5/04,

IT IS ORDERED:

The Petition for Hearing is **DENIED**.

Entered by the direction of the court.

Clerk of the Appellate Courts

/s/ Marilyn May
Marilyn May

cc: Supreme Court Justices
COA Judges
Judge Lohff
Central Staff
Trial Court Clerk – Anchorage

CONSTITUTIONAL PROVISIONS, STATUTES, COURT RULES, ORDINANCES, AND REGULATIONS

United States Constitution, Article I, Section 8, Clauses 3 and 8.

Powers of Congress. The Congress shall have Power . . .

. . .

To regulate Commerce . . . among the several States; . . .

. . .

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; . . . .

United States Constitution, Article VI, Section 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, First Amendment.

Congress shall make no law respecting establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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17 U.S.C. § 101 – Definitions.

* * *

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

* * *

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

* * *

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are

capable of existing independently of, the utilitarian aspects of the article.

* * *

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17 U.S.C. § 102 – Subject matter of copyright: In general.

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

. . .

(5) pictorial, graphic, and sculptural works; . . . .

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

---

17 U.S.C. § Sec. 103 – Subject matter of copyright: Compilations and derivative works.

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of

such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material

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17 U.S.C. § 105 – Subject matter of copyright: United States Government works.

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

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17 U.S.C. § 106 – Exclusive rights in copyrighted works.

Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

. . .

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; . . . .

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17 U.S.C. § 301. – Preemption with respect to other laws.

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to –

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978;

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or

. . .

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

. . .

Alaska Stat. § 44.09.010. State seal.

The official seal of the State of Alaska is comprised of two concentric circles between which appear the words "The Seal of the State of Alaska" and within the inner circle is the design of the seal corresponding to the representation in this section.

Alaska Stat. § 44.09.017. Commemorative gold and silver medallions.

(a) The Department of Administration shall contract or otherwise arrange for the minting and sale of Alaska

commemorative medallions minted only from .999 fine gold and silver in weights determined by the commissioner of administration. Gold and silver mined in Alaska shall be used in the production of the medallions. The state shall receive a royalty from the sale of the medallions. The amount of the royalty shall be determined by the commissioner of administration.

(b) One side of the commemorative medallions minted under this section shall contain the state seal. The design for the other side shall be determined in an annual contest conducted by the contractor under the supervision of the Department of Administration. Only designs using an Alaska theme and submitted by an Alaska resident may be considered in the contest. Payment for the winning design may not exceed $1,000.

Alabama

Code of Ala. § 13A-10-13 (2004)

§ 13A-10-13. Seal of state; use for commercial purpose – Identification cards; printing or distributing facsimile without disclaimer

(a) It is unlawful for anyone to use an image or facsimile of the Great Seal of the State of Alabama as described in Section 1-2-4 for any commercial purpose.

(b) It is unlawful for anyone to print or distribute, or both, a facsimile of an official identification card issued by the Department of Public Safety, which does not have a disclaimer of the authenticity of the card printed on the front of the card. The disclaimer shall be of the same size

and type as the type used for the largest type on the facsimile of an official identification card.

(c) A violation of subsection (a) or (b) of this section is a Class C felony punishable as provided by law.

Arizona

A.R.S. § 41-130 (2004)

§ 41-130. Use of state seal restricted; violation; classification

A person may use, display or otherwise employ any facsimile, copy, likeness, imitation or other resemblance of the great seal of this state only after obtaining the approval of the secretary of state. The secretary of state may grant a certificate of approval upon application by any person showing good cause for the use of the great seal of this state for a proper purpose. The great seal of this state shall in no way be employed by anyone other than a state agency for the purpose of advertising or promoting the sale of any article of merchandise whatever within this state or for promoting any other commercial purpose. The secretary of state may promulgate rules for the use of the great seal of this state or any facsimile, copy, likeness, imitation or other resemblance of the great seal. Any person who knowingly violates this section is guilty of a class 3 misdemeanor.

California

Cal Gov Code § 402 (2004)

§ 402. Malicious or commercial use of State Seal; Permitted uses

(a) Every person who maliciously or for commercial purposes uses or allows to be used any reproduction or facsimile of the Great Seal of the State in any manner whatsoever is guilty of a misdemeanor.

(b) Notwithstanding subdivision (a), the Great Seal of the State may be used for commercial purposes by the Golden State Museum Store located at 1020 O Street in Sacramento, and by the Capitol Bookstore and Gift Shop located in the rotunda of the restored State Capitol Building.

(c) Notwithstanding subdivision (a), the California Sesquicentennial Commission may enter into an agreement to use the Great Seal of the State for officially sanctioned products of the California Sesquicentennial celebration as approved by the commission. The funds received from these sales shall revert to the California Sesquicentennial Foundation and be used only for official Sesquicentennial celebration purposes.

Connecticut

Conn. Gen. Stat. § 3-106a (2003)

§ 3-106a. Reproduction of arms and seal.

The official arms and seal of the state of Connecticut, or imitation thereof, whether as a reproduction, imprint or facsimile, shall be made and used only under the direction

and with the approval of the Secretary of the State for purposes specifically authorized by the Constitution and laws of the state or related directly or indirectly to the official business of the state, provided the Secretary may in his judgment approve other reproductions of said arms or seal of the state for memorials and for purposes he considers educational.

Delaware

29 Del. C. § 2306 (2004)

§ 2306. Use of Great Seal and Privy Seal; restrictions; reproduction of seals and other insignia subject to approval; penalties

(a) The Secretary of State as the keeper of the Great Seal and the Privy Seal shall restrict the use of the Great Seal and the Privy Seal to documents, records, publications and other business transactions of the State.

(b) The seals, coat of arms, state flag, emblems and other insignia of this State may be used, reproduced or published with the written consent of the Secretary of State, provided that use is restricted to educational uses such as encyclopedias, reference books, historical publications or similar uses which do not involve advertising or other means of personal gain or which abrogate the rights of the citizenry of the State.

(c) Whoever violates or fails to comply with this section shall be fined not less than $ 100 nor more than $ 250.

(d) Notwithstanding anything to the contrary contained in any act enacted prior to April 17, 1961, authorizing

the Governor, the State Treasurer and the Secretary of State to act as issuing officers in issuing bonds of this State or in any other law, the Secretary of State may, in executing said bonds on behalf of the State, cause a facsimile of the Great Seal of the State to be engraved or printed thereon and, in any such case, it shall not be necessary to affix to or impress on said bonds the Great Seal of the State.

Florida

Fla. Stat. § 15.03 (2004)

§ 15.03. State seal

(1) The great seal of the state shall be of the size of the American silver dollar, having in the center thereof a view of the sun's rays over a highland in the distance, a sabal palmetto palm tree, a steamboat on water, and an Indian female scattering flowers in the foreground, encircled by the words "Great Seal of the State of Florida: In God We Trust."

(2)(a) The Department of State shall be the custodian of the great seal of the state.

(b) The great seal of this state shall also be the seal of the Department of State, and the department may certify under said seal, copies of any statute, law, resolution, record, paper, letter or document, by law placed in its custody, keeping and care, and such certified copy shall have the same force and effect in evidence, as the original would have.

(3) Only the Department of State shall be authorized to affix the seal to any document for the purpose of attesting, certifying, or otherwise formalizing such document. Any facsimile or reproduction of the great seal shall be manufactured, used, displayed, or otherwise employed by anyone only upon the approval of the Department of State. The Department of State may grant a certificate of approval upon application to it by any person showing good cause for the use of the seal for a proper purpose. The Department of State may adopt reasonable rules for the manufacture or use of the great seal or any facsimile or reproduction thereof. Any person violating the provisions of this subsection is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Georgia

O.C.G.A. § 50-3-31 (2002)

§ 50-3-31. Use and display; facsimile

In addition to official documents which require that the great seal be affixed, the Governor may authorize the use and display of the great seal or a facsimile of the state emblem under such conditions as he may impose when there shall be demonstrated to his satisfaction that the intended use or display thereof is appropriate and legitimate and is not contrary to the state's interest in preserving the sanctity and dignity of the state seal and emblem and that the use or display will not otherwise violate Code Section 50-3-8 or 50-3-9.

O.C.G.A. § 50-3-8 (2002)

§ 50-3-8. United States, State and Confederate flags and emblems; use in advertising or promoting prohibited

(a) It shall be unlawful for any person, firm, or corporation to copy, print, publish, or otherwise use the flag of the United States, the flag, coat of arms, or state emblem of the State of Georgia, or the flag or emblem of the Confederate States of America, or any flag or emblem used by the Confederate States of America or the military or naval forces of the Confederate States of America at any time within the years 1860 to 1865, both inclusive, for the purpose of advertising, selling, or promoting the sale of any article of merchandise whatever within this state.

(b) Notwithstanding subsection (a) of this Code section, any person, firm, or corporation which contracts with the state to publish an official Code shall be authorized to use the state emblem on the cover of the publication. Utilization by the contracting person, firm, or corporation of the cover of the publication, with the state emblem thereon, for advertising purposes shall not constitute a violation of subsection (a) of this Code section.

Hawaii

HRS § 5-6 (2003)

§ 5-6. Seal; commercial use

Whoever uses any representation of the great seal or the coat of arms of the State in any advertisement or for any commercial purpose or in any manner likely to give the impression of official State approval shall be guilty of a misdemeanor. The preceding sentence shall not be

construed to apply to the use of the seal or the coat of arms in any newspaper, periodical, book or pamphlet wherein the seal or coat of arms is printed for informational purposes only.

Illinois

5 ILCS 460/5 (2004)

§ 5 ILCS 460/5. State seal

Sec. 5. State seal. (a) The reproduction of the emblem only on the "great seal of the State of Illinois" is authorized and permitted when reproduced in black or in the national colors upon a white sheet or background and bearing underneath the emblem in blue letters the word "Illinois" and being an actual reproduction of the great seal, except for the outer ring, for use as a State banner or insignia under the conditions and subject to the restrictions provided by the laws of the United States and the State of Illinois as to the United States or State flag or ensign.

(b) It is lawful for the Secretary of State as custodian of the "great seal of the State of Illinois" to permit at his or her discretion the inspection and examination of the seal for the purpose of copying or reproducing the emblem only on the great seal for the uses and purposes authorized by this Section.

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720 ILCS 620/1 (2004)

620/1. Desecration, mutilation or improper use; penalty

§ 1. Any person who (a) for exhibition or display, places or causes to be placed any word, figure, mark, picture,

design, drawing, or any advertisement of any nature, upon any flag, standard, color or ensign of the United States or State flag of this State or ensign, (b) exposes or causes to be exposed to public view any such flag, standard, color or ensign, upon which has been printed, painted or otherwise placed, or to which has been attached, appended, affixed, or annexed, any word, figure, mark, picture, design or drawing or any advertisement of any nature, or (c) exposes to public view, manufactures, sells, exposes for sale, gives away, or has in possession for sale or to give away or for use for any purpose, any article or substance, being an article of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise upon which has been printed, painted, attached, or otherwise placed a representation of any such flag, standard, color, or ensign, to advertise, call attention to, decorate, mark or distinguish the article or substance on which so placed, shall be guilty of a Class C misdemeanor.

Any person who publicly mutilates, defaces, defiles, tramples, or intentionally displays on the ground or floor any such flag, standard, color or ensign shall be guilty of a Class 4 felony.

Maine

1 M.R.S. § 204 (2003)

§ 204. Use of state seal for commercial purposes

No imitation, imprint, representation, facsimile or copy of the seal of the State of Maine shall be used or displayed for commercial purposes by any person, firm or corporation, except by written permission of the Governor. Any person may sell flags containing the state seal or a

facsimile of the state seal. Whoever violates any of the provisions of this section shall be guilty of a Class E crime.

Michigan

MCL § 2.44 (2004)

§ 2.44. Great seal; impression on certain documents.

Sec. 4. An impression of the great seal shall be placed on the following documents but no others:

(a) Extraditions.

(b) Warrants issued under extradition proceedings.

(c) Pardons.

(d) Commutations of sentences.

(e) Appointments by the governor to public office.

(f) Railroad police commissions.

(g) Notary public commissions.

(h) Governor's proclamations including those calling extraordinary sessions of the Legislature.

(i) Land patents.

(j) Farm centennial certificates issued where land has been in the family for 100 years or more.

(k) Military commissions issued under authority of the adjutant general.

(l) Certifications of the holding of office by the administrative board members, county clerks and notaries public.

(m) Certifications of the qualifications of elected and appointed officials.

(n) Trademark registration certificates.

(o) Copies of records and documents required by law to be filed with or maintained by the secretary of state for the purpose of authenticating their genuineness.

MCL § 2.45 (2004)

§ 2.45. Great seal; facsimiles and reproductions.

Sec. 5. No facsimile or reproduction of the great seal shall be used in a manner unconnected with official functions of the state.

MCL § 2.46 (2004)

§ 2.46. Great seal violations; penalty.

Sec. 6. Any person who violates any provision of this act shall be guilty of a misdemeanor.

Nevada

NRS § 235.010 (2004)

§ 235.010. Contents and design of seal; authorized use; official colors; exceptions; penalty

1. There must be a seal of the State of Nevada called The Great Seal of the State of Nevada, the design of which is as follows: In the foreground, there must be two large mountains, at the base of which, on the right, there must

be located a quartz mill, and on the left a tunnel, penetrating the silver leads of the mountain, with a miner running out a carload of ore, and a team loaded with ore for the mill. Immediately in the foreground, there must be emblems indicative of the agricultural resources of the state, as follows: A plow, a sheaf and sickle. In the middle ground, there must be a railroad train passing a mountain gorge and a telegraph line extending along the line of the railroad. In the extreme background, there must be a range of snow-clad mountains, with the rising sun in the east. Thirty-six stars and the motto of our state, "All for Our Country," must encircle the whole group. In an outer circle, the words "The Great Seal of the State of Nevada" must be engraved with "Nevada" at the base of the seal and separated from the other words by two groups of three stars each.

2. The size of the seal must not be more than 2 3/4 inches in diameter.

3. The seal must be kept by the governor and used by him officially. The secretary of state must have access to the seal at all times, and may use it in verification of all his official acts.

4. A reproduction or facsimile of the seal may only be used:

(a) With the written permission of the governor;

(b) In the performance of official acts by an agency of one of the branches of state government;

(c) On items distributed by an agency of one of the branches of state government which are not necessary to carry out the duties of that agency, if the use

of the reproduction or facsimile is approved by the head of that agency;

(d) On medallions or bars minted pursuant to the direction of the director; or

(e) As otherwise permitted by a specific statute.

5. Except as otherwise provided in subsection 6, a colored reproduction or facsimile of the state seal may only be used if it is in substantially the following colors:

[Contact State Printing Office for appropriately colored version of the State Seal]

6. A person or entity that is granted permission to use the state seal pursuant to:

(a) Paragraph (a) of subsection 4 may use a reproduction or facsimile of the state seal that does not consist of the official colors provided in subsection 5 if the governor has authorized such use in the written permission.

(b) Paragraph (b), (c), (d) or (e) of subsection 4 may use a one-color, two-color or metallic reproduction or facsimile of the state seal in addition to or in lieu of the official colors provided in subsection 5.

7. Except as otherwise provided in NRS 205.175, a person who uses or allows to be used, any reproduction or facsimile of The Great Seal of the State of Nevada in violation of subsection 4 is guilty of a misdemeanor.

New Hampshire

RSA 3:9-a (2003)

§ 3:9-a. Unauthorized Use Prohibited

The state seal shall be the property of the state of New Hampshire. No person shall manufacture, sell, expose for sale, or have in possession for sale any article or substance, being an article of merchandise or receptacle of merchandise or article or thing for carrying or transporting merchandise, or sell, expose for sale, give away, or have in possession for sale or to give away or for any purpose any article or thing to advertise or promote services, upon which shall have been printed, painted, attached, or otherwise placed a representation or likeness of the state seal, provided, however, that upon application, the secretary of state may authorize the use of the state seal. Once such approval is given, such use shall be exempt from the provisions of this section until or unless such approval is revoked or suspended by the secretary of state.

RSA 3:9-b (2003)

§ 3:9-b. Penalty

Whoever violates the provisions of RSA 3:9-a shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

New Jersey

N.J. Stat. § 52:2-9 (2004)

§ 52:2-9. Use of reproductions; consent; rules and regulations; violations; penalties

Notwithstanding any other provision of the law, the Secretary of State is hereby authorized to give written consent to the use of reproductions of the Great Seal of the State of New Jersey in the preparation of commemorative items and for historical, civic and educational purposes. The secretary shall promulgate rules and regulations governing the extent of each such usage to prevent inappropriate or misleading use of the Seal and to assure a high quality reproduction thereof. He shall require every application for such consent to be accompanied by such information and specifications as he shall deem necessary in order to assure compliance with his rules and regulations. Each application shall be accompanied by a $ 10.00 filing fee and shall be valid for not longer than 1 year from the date of its issuance.

Any person who violates the provisions of this act or the rules and regulations promulgated by the secretary shall be liable to a penalty of $ 50.00 for each violation. Such penalty shall be collected and enforced in a summary proceeding in accordance with the provisions of the penalty enforcement law, N.J.S. 2A:58-1.

N.J. Stat. § 52:2-4 (2004)

§ 52:2-4. Unauthorized use; penalty

Any person who is not authorized by law to use, exhibit or display the State Seal, who uses, exhibits or

displays the Great Seal of the State of New Jersey, in whole or in part, is a disorderly person and upon conviction as such shall be subject to a fine of $ 50.00.

New York

NY CLS STATE § 74 (2004)

§ 74. Use of the great seal

All such matters as have issued under the great seal of the state since March sixteenth, seventeen hundred seventy-eight, shall continue to be issued under such seal, except copies of papers and records certified by the secretary of state or his deputy and authenticated under his seal of office. The secretary of state may, however, upon such terms and conditions as he may deem appropriate, furnish an impression, replica or print of the great seal of the state for use as a collector's item, for use in preparing a collector's item or for educational purposes.

NY CLS STATE § 74-a (2004)

§ 74-a. New York state collectible series panel

1. There is hereby created an advisory panel to be known as the "New York state collectible series panel" which, in connection with the design, marketing, distribution and sale of collectible items bearing the great seal, shall have the powers and duties provided for in this section. Such panel shall consist of the director of the state museum, who shall serve as chairperson, the secretary of state and ten other members appointed by the governor, three of whom shall be appointed upon the recommendation of the temporary president of the senate, one of whom shall be

appointed upon the recommendation of the minority leader of the senate, three of whom shall be appointed upon the recommendation of the speaker of the assembly and one of whom shall be appointed upon the recommendation of the minority leader of the assembly. The secretary of state shall be an ex-officio, non-voting member of the panel, and shall provide technical expertise and advice to the panel as necessary. The appointed members of the panel shall serve for a term of three years provided, however, that of the members initially appointed by the governor, one member chosen upon the recommendation of the speaker of the assembly, one member chosen upon the recommendation of the temporary president of the senate, and one member chosen by the governor shall serve an initial term of one year; one member chosen upon the recommendation of the speaker of the assembly, one member chosen upon the recommendation of the temporary president of the senate, and one member chosen by the governor shall serve an initial term of two years. Members of the panel shall not be entitled to any compensation for services on the panel but shall be entitled to be reimbursed for their actual and necessary expenses incurred in performance of their official duties hereunder. Vacancies on the panel shall be filled in the same manner and for the remainder of the term of the original appointment.

2. The functions, powers and duties of the panel shall be as follows:

a. celebrate the tradition of New York by annually designating and monitoring the production or manufacture of a series of collectible memorabilia to be made available in limited quantities for purchase by the public. Such memorabilia shall have the great seal engrossed or

printed thereon and shall be identified as a limited edition collectible. All memorabilia shall be accompanied by a pamphlet approved by the panel and provided by the manufacturer which shall provide the historical information on both the item and the manufacturer;

b. enter into such contracts and agreements, or authorize another entity to enter into such contracts and agreements, with any New York based corporation to make such memorabilia available to the public. Such agreement shall include the price at which such items may be sold, the amount thereof which may be retained by such corporation as profit, the amount to be realized by the retailer, and the amount to be realized by the state from such sale;

c. solicit and secure ideas and suggestions from New York based businesses as to the memorabilia to be so designated;

d. monitor the marketing and sale of such memorabilia to insure authenticity; and

e. engage in such other activities as are necessary to carry out the provisions of this section.

3. The monies realized by the state from the sale of the memorabilia authorized by the panel shall be deposited into the New York state collectible series fund established in section ninety-four-d of the state finance law.

4. The panel shall be entitled to request and receive and shall utilize and be provided with such facilities, resources and data of the state museum and the secretary of state as it may reasonably request to carry out properly its powers and duties hereunder. The panel may solicit the support of any state governmental entity in distributing information

to the public concerning the availability of such memorabilia, and such governmental entity is hereby authorized in cooperate in such task.

5. The secretary of state shall, upon such terms and conditions as the panel may deem appropriate, furnish an impression, replica or print of the great seal of the state for use in preparing memorabilia pursuant to this section.

6. The panel is authorized to award grants as specified in this section and section ninety-four-d of the state finance law.

7. The panel shall file an annual report with the governor, the temporary president of the senate and the speaker of the assembly on the program provided for in this section. Such report shall be filed annually on or before March first.

North Dakota

N.D. Cent. Code, § 54-02-01 (2003)

§ 54-02-01. Great seal – Permitted uses – Penalty for commercial use

1. The great seal of the state is that prescribed in section 2 of article XI of the Constitution of North Dakota. A description in writing of such seal must be deposited and recorded in the office of the secretary of state and must remain a public record. A reproduction of the great seal may be placed on any official form, document, or stationery of any agency, authority, board, body, branch, bureau, commission, committee, council, department, division, industry, institution, or instrumentality of the state or of

any elected or appointed official of the state. A reproduction of the great seal may be placed on business calling cards produced for the use of an elected or appointed state official or state employee regardless of whether the cards are purchased by the official or employee or by the state. Any use of the great seal on any other object or thing by any of the foregoing state entities or officials is prohibited unless approved by the secretary of state; provided, however, that the state historical society and the parks and recreation department may, with the concurrence of the secretary of state, reproduce the great seal on any objects they offer for sale as souvenirs.

2. It is a class B misdemeanor for any person to:

a. Place or cause to be placed the great seal, or any reproduction of the great seal, on any political badge, button, insignia, pamphlet, folder, display card, sign, poster, billboard, or on any other public advertisement, or to otherwise use the great seal for any political purpose, as defined in section 16.1-10-02.

b. Place or cause to be placed on the great seal, or any reproduction thereof, any advertisement.

c. Expose the great seal, or any reproduction thereof, to public view with any advertisement attached thereto.

d. Utilize the great seal, or a copy or reproduction thereof, for any commercial purpose.

As used in this subsection, "advertisement" means any printed matter, device, picture, or symbol, no matter how presented to the senses, which informs the public that a good or service is available; and "commercial purpose" means with intent to produce a pecuniary gain through sale of a good or service. Notwithstanding any other

provision of law, the secretary of state may grant a written request by a private vendor to reproduce official state forms and documents, containing a reproduction of the great seal, for resale to persons intending to submit the forms or documents to any state entity in the regular course of business. The secretary of state may also grant a written request by a publisher, educational institution, or author to reproduce the great seal in any research, reference, or educational publication containing a compilation of the great seals of other states.

Ohio

ORC Ann. 5.10 (2004)

§ 5.10. Engraving upon and dimensions of official seals

All official seals shall have engraved thereon the coat of arms of the state, as described in section 5.04 of the Revised Code.

The great seal of the state shall be two and one-half inches in diameter and shall consist of the coat of arms of the state within a circle having a diameter of one and three-fourths inches, surrounded by the words "THE GREAT SEAL OF THE STATE OF OHIO" in news gothic capitals. The great seal of the state shall correspond substantially with the following design:

The design of the great seal shall not be reproduced, except as required by any provision of the Ohio Constitution and the Revised Code, unless permission to do so is first obtained from the governor. The governor may authorize reproduction of the design of the great seal when the purpose is to:

(A) Permit publication of a reproduction of the great seal of the state of Ohio;

(B) Aid educational or historical programs;

(C) Promote the economic or cultural development of the state in a manner deemed appropriate by the governor.

A permanent record shall be kept in the governor's office of each permit to reproduce the design of the great seal.

No person shall use or permit to be used any reproduction or facsimile of the great seal or a counterfeit or nonofficial version of the great seal for any purpose not authorized by the governor.

The seal of the supreme court shall consist of the coat of arms of the state within a circle one and three-fourths inches in diameter and shall be surrounded by the words "THE SUPREME COURT OF THE STATE OF OHIO."

* * *

Oregon

ORS § 186.023 (2003)

186.023. Improper use of state seal.

(1) Except as authorized by the Secretary of State, no person shall knowingly use any device, or possess any device capable of such use, to emboss upon a document the seal of the State of Oregon described in ORS 186.020.

(2) No person shall use any reproduction of the seal of the State of Oregon:

(a) In any manner falsely implying official indorsement or sponsorship by the State of Oregon or any of its agencies of any product, business, service or other activity; or

(b) In any manner that subjects or exposes the seal of the State of Oregon to ridicule, debasement or infamy.

ORS § 390.245 (2003)

390.245. Commemorative coins; issuance; proceeds

(1) The State Treasurer may issue commemorative coins for sale to the public. Such coins shall commemorate Oregon history, people or resources and shall not constitute legal tender and may include the use of the state seal of Oregon under ORS 186.023. If the State Treasurer decides to issue commemorative coins using the state seal, no private entity shall be authorized to use the state seal on any commemorative coins.

(2) All moneys received by the State Treasurer from the sale of commemorative coins shall be paid into the State Treasury and credited to a separate Commemorative Coin Account established within the State Parks and Recreation Department Fund. The State Treasurer is authorized to charge the account the reasonable expenses incurred in the design, production and sale of the coins.

(3) All moneys in the account, net of expenses charged, are appropriated continuously to the State Parks and Recreation Department for park land acquisition and development and for historical observances related to historical areas and sites.

Rhode Island

R.I. Gen. Laws § 11-15-4 (2004)

§ 11-15-4. Use of state emblems for commercial purposes

No person, firm or corporation shall use the state seal, the state coat of arms, or a facsimile or imitation of them, for commercial purposes. The use of the state seal, the state coat of arms, or a facsimile or imitation of them as a portion of any letterhead, or in any advertisement, shall create a presumption that the use is for commercial purposes. Any person who violates any provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined not exceeding five hundred dollars ($ 500).

South Carolina

S.C. Code Ann. § 38-57-45 (2003)

§ 38-57-45. Use of state seal prohibited in advertising or promotion unless expressly approved; state endorsement disclaimer required on solicitation to state employees.

(A) No insurance agency, insurer, or health maintenance organization may make, publish, disseminate, circulate, or place before the public or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine, or other solicitation material, an advertisement, representation, or statement with respect to the business of insurance which utilizes the Seal of South Carolina or any symbol which contains, includes, or is derivative of the Seal of South Carolina without the approval of the State Budget and Control Board.

(B) An insurance agency, an insurer, or a health maintenance organization must include in a prominent manner in solicitation material it utilizes specifically directed at and distributed to state employees a statement that the insurance program or health maintenance program is not officially endorsed by the State unless the program officially has been endorsed by the Budget and Control Board.

South Dakota

S.D. Codified Laws § 1-6-3.1 (2003)

§ 1-6-3.1. Use of seal, facsimile, commemorative medallion design or bullion piece design without authorization prohibited – Violation as misdemeanor

No person may reproduce, duplicate or otherwise use the official seal of the state of South Dakota, or its facsimile, adopted and described in §§ 1-6-1 and 1-6-2, or the state commemorative medallion design or the state bullion piece design adopted by the commissioner of administration for any for-profit, commercial purpose without specific authorization from the commissioner of the bureau of administration. A violation of this section is a Class 1 misdemeanor.

S.D. Codified Laws § 1-6-3.2 (2003)

§ 1-6-3.2. Sale of seal facsimile, commemorative medallion design or bullion piece design without authorization prohibited – Violation as misdemeanor

No person may sell or offer for sale a replica or facsimile of the official seal of the state of South Dakota, adopted

and described in §§ 1-6-1 and 1-6-2, or the state commemorative medallion design or the state bullion piece design adopted by the commissioner of administration without the specific authorization from the commissioner of the bureau of administration. A violation of this section is a Class 1 misdemeanor.

Texas

Tex. Bus. & Com. Code § 17.08 (2004)

§ 17.08. Private Use of State Seal

(a) In this section:

(1) "Commercial purpose" means a purpose that is intended to result in a profit or other tangible benefit but does not include:

(A) official use of the state seal or a representation of the state seal in a state function;

(B) use of the state seal or a representation of the state seal for a political purpose by an elected official of this state;

(C) use of the state seal or a representation of the state seal in an encyclopedia, dictionary, book, journal, pamphlet, periodical, magazine, or newspaper incident to a description or history of seals, coats of arms, heraldry, or this state;

(D) use of the state seal or a representation of the state seal in a library, museum, or educational facility incident to

descriptions or exhibits relating to seals, coats of arms, heraldry, or this state;

(E) use of the state seal or a representation of the state seal in a theatrical, motion-picture, television, or similar production for a historical, educational, or newsworthy purpose; or

(F) use of the state seal or a representation of the state seal for another historical, educational, or newsworthy purpose if authorized in writing by the secretary of state.

(2) "Representation of the state seal" includes a nonexact representation that the secretary of state determines is deceptively similar to the state seal.

(3) "Official use" means the use of the state seal by an officer or employee of this state in performing a state function.

(4) "State function" means a state governmental activity authorized or required by law.

(5) "State seal" means the state seal, the reverse of the state seal, and the state arms as defined by Article 6139f, Revised Statutes.

(b) Except as otherwise provided by this section, a person may not use a representation of the state seal:

(1) to advertise or publicize tangible personal property or a commercial undertaking; or

(2) for another commercial purpose.

(c) A person may use a representation of the state seal for a commercial purpose if the person obtains a license from the secretary of state for that use. The secretary of state, under the authority vested in the secretary as custodian of the seal under Article IV, Section 19, of the Texas Constitution, shall issue a license to a person who applies for a license on a form provided by the secretary of state and who pays the fees required under this section if the secretary of state determines that the use is in the best interests of the state and not detrimental to the image of the state. A license issued under this section expires one year after the date of issuance and may be renewed.

(d) The secretary of state shall adopt rules relating to the use of the state seal by a person licensed under this section. The secretary of state shall adopt the rules in the manner provided by Chapter 2001, Government Code.

(e) The application fee for a license under this section is $ 35. The license fee for an original or renewal license is $ 250. In addition to those fees, each licensee shall pay an amount equal to three percent of the licensee's annual gross receipts related to the licensed use in excess of $ 5,000 to the state as a royalty fee.

(f) A person licensed under this section shall maintain records relating to the licensee's use of the state seal in the manner required by the rules of the secretary of state. The secretary of state may examine the records during reasonable business hours to determine the licensee's compliance with this section. Each licensee shall display the license in a conspicuous manner in the licensee's office or place of business.

(g) The secretary of state may suspend or revoke a license issued under this section for failure to comply with this section or the rules adopted under this section. The secretary of state may bring a civil action to enjoin a violation of this section or the rules adopted under this section.

(h) A person who reproduces an official document bearing the state seal does not violate Subsection (b) of this section if the document is:

(1) reproduced in complete form; and

(2) used for a purpose related to the purpose for which the document was issued by the state.

(i) A person who violates a provision of Subsection (b) of this section commits an offense. An offense under this section is a Class C misdemeanor.

(j) A person who violates Subsection (b) of this section commits a separate offense each day that the person violates a provision of that subsection.

Vermont

13 V.S.A. § 1904a (2003)

§ 1904a. Use of state seal and coat of arms

The state seal and coat of arms may be used for commemorative medals or for public displays not connected with any advertising, provided that:

(1) the use does not imply state endorsement or approval when none has been given; and

(2) a sample of the medal or display is delivered to the secretary of state prior to manufacture, distribution or sale.

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13 V.S.A. § 1905 (2003)

§ 1905. Penalty

A person who violates any provision of this subchapter shall be imprisoned not more than one year or fined not more than $ 1,000.00, or both.

Virginia

Va. Code Ann. § 7.1-31.1 (2004)

§ 7.1-31.1. Seals deemed property of Commonwealth; unauthorized use

The seals of the Commonwealth shall be deemed the property of the Commonwealth; and no persons shall exhibit, display, or in any manner utilize the seals or any facsimile or representation of the seals of the Commonwealth for nongovernmental purposes unless such use is specifically authorized by law.

Except as provided in § 2.2-122, any person violating the provisions of this section shall be punished by a fine of not more than $ 100, or by imprisonment for not more than thirty days or both.

Washington

Rev. Code Wash. (ARCW) § 43.04.030 (2004)

§ 43.04.030. Use of state seal – Official purposes

Except as otherwise provided in this chapter, the state seal shall be used for official purposes only.

§ 43.04.040. Use of state seal – Commemorative and souvenir items – Historical, educational, and civil purposes – Application – Fee – Licensing agreements – Rules

(1) The secretary of state may authorize the use of the state seal on commemorative and souvenir items, and for historical, educational, and civic purposes. Such authorization shall be in writing.

(2) Application for such authorization shall be in writing and shall be accompanied by a filing fee, the amount of which shall be determined by the secretary of state. The secretary shall set the fee at a level adequate to cover the administrative costs of processing the applications.

(3) If the secretary determines that a permitted use of the seal could financially benefit the state, the secretary may condition authorization upon a licensing agreement to secure those benefits for the state.

(4) The secretary of state shall adopt rules under chapter 34.05 RCW to govern the use of the seal in a manner consistent with this chapter. Any rule governing the use of the seal shall be designed to prevent inappropriate or misleading use of the seal and to assure tasteful and high-quality reproduction of the seal. The rules shall also prescribe the circumstances when a licensing

arrangement shall be required and the method for determining licensing fees.

Rev. Code Wash. (ARCW) § 43.04.050 (2004)

§ 43.04.050. Use of state seal – Prohibitions – Imitations

(1) Except as otherwise provided in RCW 43.04.040, the state seal shall not be used on or in connection with any advertising or promotion for any product, business, organization, service, or article whether offered for sale for profit or offered without charge.

(2) The state seal shall never be used in a political campaign to assist or defeat any candidate for elective office.

(3) It is a violation of this chapter to use any symbol that imitates the seal or that is deceptively similar in appearance to the seal, in any manner that would be an improper use of the official seal itself.

(4) Nothing in this chapter shall prohibit the reproduction of the state seal for illustrative purposes by the news media if the reproduction by the news media is incidental to the publication or the broadcast. Nothing in this chapter shall prohibit a characterization of the state seal from being used in political cartoons.

Rev. Code Wash. (ARCW) § 43.04.060 (2004)

§ 43.04.060. Endorsements prohibited

No use of the state seal may operate or be construed to operate in any way as an endorsement of any business, organization, product, service, or article.

Rev. Code Wash. (ARCW) § 43.04.070 (2004)

§ 43.04.070. Civil penalties – Injunctions

Any person who violates RCW 43.04.050(1) or (3) by using the state seal or an imitative or deceptively similar seal on or in connection with any product, business, organization, service, or article shall be liable for damages in a suit brought by the attorney general. The damages shall be equal to the gross monetary amount gained by the misuse of the state seal or the use of the imitative or deceptively similar seal, plus attorney's fees and other costs of the state in bringing the suit. The "gross monetary amount" is the total of the gross receipts that can be reasonably attributed to the misuse of the seal or the use of an imitative or deceptively similar seal. In addition to the damages, the violator is subject to a civil penalty imposed by the court in an amount not to exceed five thousand dollars. In imposing this penalty, the court shall consider the need to deter further violations of this chapter.

The attorney general may seek and shall be granted such injunctive relief as is appropriate to stop or prevent violations of this chapter.

Rev. Code Wash. (ARCW) § 43.04.090 (2004)

§ 43.04.090. Criminal penalty

Any person who wilfully violates this chapter is guilty of a misdemeanor.

IN THE DISTRICT COURT FOR THE
STATE OF ALASKA THIRD JUDICIAL
DISTRICT AT ANCHORAGE

STATE OF ALASKA, Plaintiff, v. SCOTT PETERSON ROBART, DOB: 04-15-48 AK ID/OL: 673079 SSN: 029-38-8694 ATN: 100-248-667 Defendant.	)	Court No. 3AN-S97-6951 Cr.

Victims' Rights Act Certification

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.14D or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

AMENDED INFORMATION

USE OF STATE SEAL WITHOUT PERMISSION
A.S. 44.09.015
(Filed Sept. 5, 1997)

THE ATTORNEY GENERAL CHARGES:

That on or about the 6th day of August, 1997, at or near Anchorage, in the Third Judicial District, State of

Alaska, Scott Peterson Robart did knowingly use an impression of the state seal for an advertising or commercial purpose without the written permission of the lieutenant governor.

All of which is a misdemeanor offense punishable by a fine of up to $500 and by imprisonment of up to six months or both, being contrary to and in violation of AS 44.09.015 and against the peace and dignity of the State of Alaska.

I, Leonard M. Linton, Jr., Assistant Attorney General, state on oath that this charge is based upon the report of Corporal Steve Garrett of the Alaska State Troopers to the following effect.

A.S. 44.09.015 provides as follows:

> **Use of seal without permission prohibited.**
> (a) A person may not use or make a die or impression of the state seal for any advertising or commercial purpose, unless written permission has first been obtained from the lieutenant governor.
> (b) Violation of this section is a misdemeanor, and upon conviction is punishable by a fine of not more than $500, or by imprisonment for not more than six months, or by both.

On May 24, 1997, the QVC shopping network held a sale of Alaska products. During the QVC broadcast, Scott Peterson Robart, doing business as "Commemorative Designs," marketed a silver coin commemorating the anniversary of the 1897 gold rush and bearing the seal of the State of Alaska on one side.

On May 29, 1997, Lt. Gov. Fran Ulmer wrote to Scott Robart and advised him that his use of the state seal without her permission was in violation of A.S. 44.09.015.

She asked him to stop. She also enclosed a copy of the statute with her letter. The same day, Scott Robart responded in a letter in which he acknowledged receiving a faxed copy of the lieutenant governor's letter.

Believing that Mr. Robart might disregard the lieutenant governor's letter, Corporal Steve Garrett, Alaska State Troopers, wrote to Robart on July 16, 1997, posing as a person who had seen the coin on the QVC broadcast and who wanted to buy some of the coins. Robart responded, writing, "I have the coins here in stock, given me a holler and you can stop by and get one."

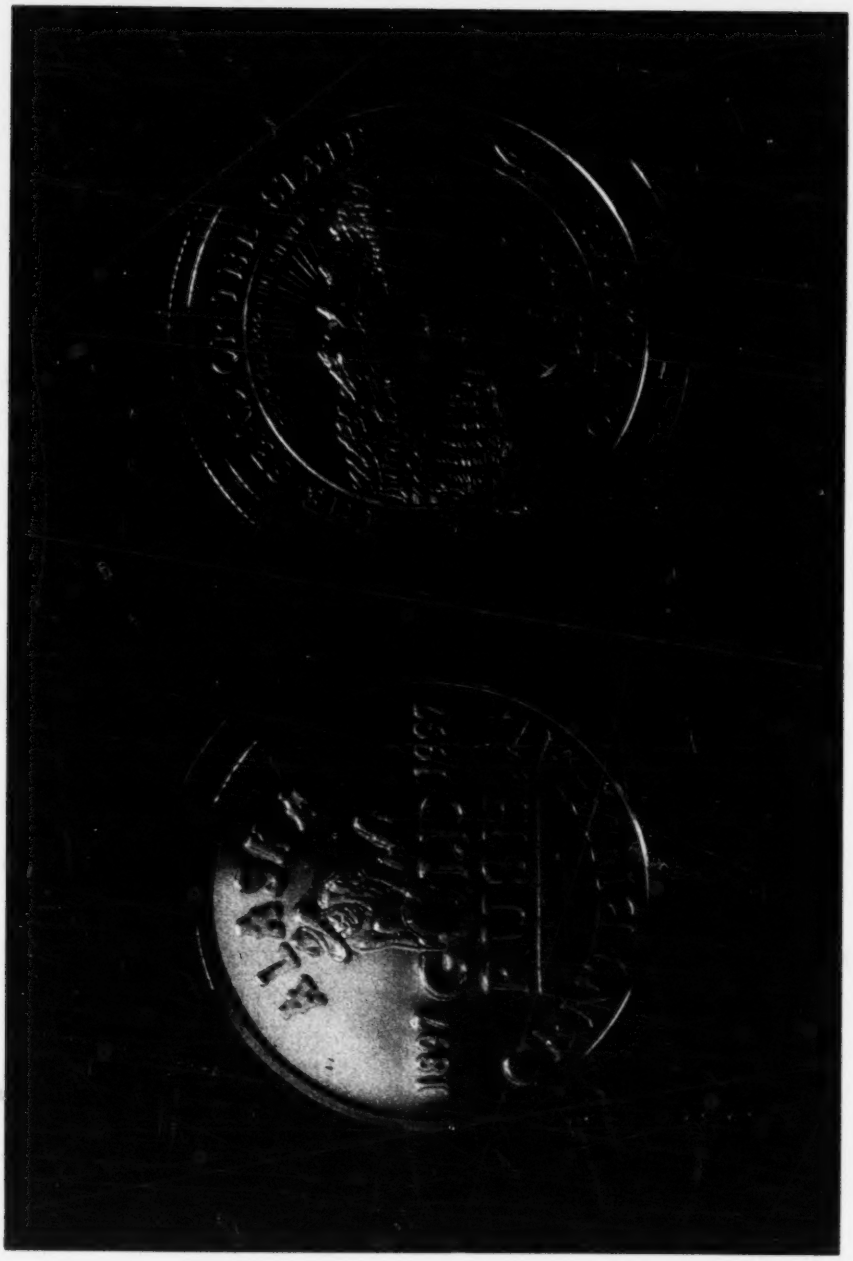
On August 5, 1997, Cpl. Garrett applied for and received a *Glass* warrant to record a transaction between an Alaska State Trooper, acting undercover, and Robart. Later that day, Trooper Curt Harris, posing as a buyer, telephoned Robart to discuss purchasing the coin and recorded the conversation. Robart told him that he had such coins and that the price was $29 retail, but that he would sell them for $25. The next day, August 6, Trooper Harris went to Robart's address and met him. Robart sold him two coins bearing the state seal for $50.

On August 12, 1997, Cpl. Garrett interviewed Robart at his home. Robart admitted having ordered the coin and having received the letter from the lieutenant governor; but when Cpl. Garrett asked him whether he had continued to sell the coins, he said he had not.

Dated this 3rd day of September, 1997, at Anchorage, Alaska.

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Leonard M. Linton, Jr.
Leonard M. Linton, Jr.
Assistant Attorney General



These medallions are presented with a real Alaskan Gold Nugget in the 'panner's' pan, and are serial numbered separately, limiting the striking to 10,000 coins.

These coins will be available until supplies are exhausted, through select retailers in Alaska, or through the manufacturer.

1997 & 1998 mark the centennial of two of the most interesting years in Alaska's history; the Gold Rush years. There were several "rushes" throughout the late 1800's & early 1900's. The Klondike, actually discovered in 1896 in Canada, and "rushed" in 1897 & 1898, Nome's beaches in 1899, and Fairbanks in 1902.

MOTION FILED
SEP 15 2004

(2)

No. 04-215

In The
Supreme Court of the United States

SCOTT P. ROBART,

Petitioner,

v.

THE STATE OF ALASKA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Alaska

MOTION OF AMERICAN MINT LLC FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE

Petitioner, Scott P. Robart, has consented to the filing of this brief by *amicus curiae*. Respondent, State of Alaska, has withheld consent. The American Mint LLC hereby moves, pursuant to Supreme Court Rule 37.2(b), for leave to file an *amicus curiae* brief in support of Petitioner.

American Mint LLC is in the business of production, distribution and sale of commemorative items throughout the United States.

American Mint LLC submits this brief to illustrate the impact of the Alaska Court of Appeals' decisions on the interstate commerce involved in commemorative items, including those that incorporate state seals. Certiorari review is needed to correct the Alaska Court of Appeals' erroneous interpretation of the First Amendment and the Copyright Act and to resolve the far-reaching uncertainty occasioned by that decision. Given the ramifications of this case on American Mint LLC and other similarly situated businesses, American Mint LLC respectfully requests leave to file the attached brief *amicus curiae* in support of Petitioner.

Respectfully submitted,

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BRIEF OF AMERICAN MINT LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

American Mint LLC ("American Mint") submits this *amicus curiae* brief in support of petitioner Scott P. Robart.[1] Petitioner Robart has consented to American Mint's filing of this brief, and Respondent the State of Alaska has not. A Motion for Leave to File Brief *Amicus Curiae* is therefore being filed concurrently with this brief.

I. INTEREST OF *AMICUS CURIAE*

Amicus curiae American Mint is engaged in the business of producing commemorative coins, medallions and other themed collectibles. *Amicus curiae* is actively engaged in interstate commerce and sells coins and medallions throughout the United States. The interstate commerce outside its home state of Pennsylvania is a large portion of its gross sales and is vital to its business. *Amicus curiae* is interested in continuing to grow and develop its business in a competitive marketplace without restrictions that create uncertainty in the marketplace for commemorative products.

The Alaska Court of Appeals' decisions create uncertainty in the interstate commerce venues in which *amicus curiae* is actively engaged. Those decisions raise the potential that neither the First Amendment nor the Copyright Act will shield legitimate businesses from legal

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[1] This brief was authored by counsel for American Mint, with assistance from counsel for Petitioner. Other than the *amicus curiae*, no person or entity made a monetary contribution to this brief's preparation or submission. *See* Sup. Ct. R. 37.6.

action for using a state seal without permission in 26 of the 50 states, including criminal prosecution in 18 states.

Amicus curiae submits this brief to illustrate the impact of the Alaska Court of Appeals decisions on the commemorative products industry, particularly when contrasted with the Pennsylvania Commonwealth Court's copyright preemption decision in *Bicentennial Comm'n of Pennsylvania v. Olde Bradford Co.*[2] *Amicus curiae* contend that certiorari review is needed to correct the Alaska Court of Appeals' erroneous application of both First Amendment principles and the Copyright Act and to remove the uncertainty caused by that decision.

II. SUMMARY OF ARGUMENT

Amicus curiae supports Scott Robart's petition for the reasons identified by Robart. The status of the law in light of the Alaska Court of Appeals' decisions in the Robart cases creates substantial uncertainty for individuals and businesses who are engaged in producing and marketing celebratory, non-deceptive items that incorporate governmental symbols, including state seals.

Whether as a matter of this Court's First Amendment jurisprudence, as a matter of federal copyright law, or both, there should be a uniform national rule that permits non-deceptive graphic and artistic reproductions of state seals and other governmental insignia by both businesses and individuals without prior approval from the government.

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[2] 365 A.2d 172 (Pa. Commw. Ct. 1976).

The Court should grant the petition for writ of certiorari and, upon review, should reverse the decisions of the Alaska court.

III. ARGUMENT

A. The Ruling By The Alaska Court Of Appeals Creates An Intolerable Burden On Important Interstate Commerce.

The area of commerce affected by the ruling is nationwide, substantial, and vital. American Mint has sold commemorative coins, medallions, historical badges and insignia to more than 500,000 direct mail customers throughout the United States. Many of these themed collectibles commemorate events which are central to a state's history, and which may be reflected in a state's seal. While American Mint has not utilized state seals on its products to date, it may want to do so in the future.

It is important to be able to use the symbols and imagery reflected in state seals in commemorative products. Many states have adopted seals which celebrate the unique symbols of their state, and it is natural that consumers and collectors will want to invoke the same symbols and imagery for the purpose of celebrating the state.

Allowing the decisions of the Alaska Court to stand would have the intolerable effect of permitting the use of criminal statutes to protect a state's purely economic interests in a symbol developed with taxpayer monies. The current Alaska criminal statute takes within its ambit legitimate commercial activities of Petitioner and persons similarly situated, which are protected by the First Amendment. Alaska's statute could be drafted far more

narrowly to protect the state's interest in preventing any fraudulent use of its state seal while not violating Petitioner's and other's First Amendment rights.

The ruling creates an intolerable uncertainty in the field. Furthermore, it discourages the marketing of medallions for certain states because of fear of criminal prosecution. The consequence is that consumers and collectors in some states have little choice – other than the state monopolies – for commemorative medallions.

B. The Ruling Upholding The Statute Reinforces An Unfair Monopoly By The States.

The state statutes at issue give the states monopoly advantages in a field of commerce unrelated to their core governmental functions. The state monopolies squelch competition and diminish options open to citizens, patriots, consumers and collectors.

C. The Court Should Grant The Writ Of Certiorari To Enforce A Uniform Nationwide Standard Under The First Amendment And The Copyright Act.

A uniform rule nationwide is essential. It would serve to provide certainty and predictability about rights and what is in or out of the public domain. It would further allow parties to develop new works without fear of prosecution.

The First Amendment provides a rule of national uniformity that would protect and encourage an unfettered market in symbolic speech and avoid the balkanizing effect of parochial state seal statutes.

The 1976 revision of the Copyright Act establishes a policy of national uniformity in the subject matter of copyright to accomplish certainty and predictability. A state seal incorporated in a commemorative medallion is within the subject matter of copyright under 17 U.S.C. § 102.[3] On the copyright issue, the Pennsylvania Commonwealth Court's decision in *Olde Bradford* is consistent with what the rule should be: state statutes prohibiting non-deceptive use of state seals affect copyright rights and should be subject to copyright preemption analysis.

IV. CONCLUSION

As set forth by the Petitioner and supported by the foregoing additional reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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[3] *See Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 345 (1991).